SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Filed December 5, 1973)

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Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioners California Independent Telephone Association, General Telephone Company of California, and Continental Telephone Company of California respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California (the "Court below") entered on September 6, 1973, which denied a petition for a writ of review to determine the lawfulness of a decision of the respondent Public Utilities Commission of the State of California (the "PUC").

Opinion Below

No opinion was rendered by the Court below. Under decisions of this Court and of the Court below, the denial

below of the petition for review of the order of the PUC is an affirmance on the merits on all issues including the federal constitutional issue raised both in the review proceeding and before the PUC. *Napa Valley Elec. Co.* v. *Board of Railroad Comm'rs of California,* 251 U.S. 366 (1920); *People* v. *Western Air Lines, Inc.,* 42 Cal.2d 621, 268 P.2d 723, *appeal dismissed,* 348 U.S. 859 (1954). The opinion of the PUC, not yet reported, appears in the Appendix hereto. (App. 148a-162a.)

Jurisdiction

The order of the Court below was entered on September 6, 1973. (App. 163a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1964).

Question Presented

Does a State deprive a public utility of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when it orders the utility to refund sums collected pursuant to a rate order issued without any provision for impoundment, refund or other condition, and which was not stayed and has long since become final, as to such utility?

Constitutional Provision Involved

Fourteenth Amendment, United States Constitution, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

Intrastate telephone service in California is rendered by The Pacific Telephone and Telegraph Company ("Pacific"), a subsidiary of American Telephone and Telegraph Com-

pany, and twenty-eight independent telephone companies not affiliated with the Bell System, including petitioners General Telephone Company of California and Continental Telephone Company of California.* Petitioner California Independent Telephone Association is an unincorporated non-profit trade association comprised of the twenty-eight Independent telephone companies.

Rates for intrastate toll (or long distance) telephone service in California are fixed by the PUC on a State-wide basis for all telephone companies operating within the State. The facilities of both Pacific and one or more of the Independents are often involved in a single toll call. Since 1968 the PUC has required that intrastate toll rates be uniform throughout the State, regardless of the telephone company with which the call originates or terminates. The PUC effectuates this by making the Independents parties to Pacific rate proceedings and requiring them to adopt whatever intrastate toll tariffs are established by the PUC for Pacific.** The same procedure is required with respect to multi-message unit rates.***

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* American Telephone and Telegraph Company and its subsidiaries are referred to herein as the "Bell System", and the 28 non-Bell telephone companies as "the Independents".

** The form and language of the required adoption is prescribed and directed by the PUC. (App. 112a.) It is:

> "(*Independent Telephone Company*) assents to, adopts, and concurs in the tariffs of The Pacific Telephone and Telegraph Company listed below, together with amendments thereto and successive issues thereof, and hereby makes itself a party thereto until this authority is revoked by cancellation of this adoption notice, for the purpose of furnishing all intrastate message toll telephone service thereunder originated at or terminated at a point of this Company." (App. 113a, 151a.)

*** Multi-message unit service is a modified form of toll service existing only in the San Francisco and Los Angeles metropolitan areas, involving the facilities of Pacific and petitioner General Telephone Company of California in the latter area.

In a decision dated June 22, 1971, the PUC authorized a rate increase for Pacific in three categories: (1) local exchange rates applicable only to exchange areas served by Pacific, (2) intrastate toll rates and (3) multi-message unit rates. (PUC Decision No. 78851, App. 169a.) By reason of the adoptions filed by direction of the PUC, the rates fixed for Pacific in the latter two categories of service became the only rates the Independents could lawfully charge for such service.*

The Cities of Los Angeles, San Diego and San Francisco instituted a proceeding against Pacific in the Court below, to which the Independents were not parties, to review the rate increases granted to Pacific by the PUC's order. On July 22, 1971, the effective date of the new rates, both Pacific and the Independents commenced collection of the increased sums. Pacific's collections were made subject to impoundment and refund pursuant to orders of both the PUC and the Court below and Pacific's consent (App. 174a-175a; 164a; 48a, n. 14). No such order or consent was ever sought or obtained with respect to the Independents and no condition of any kind was made applicable to their collection of the increased revenues.

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* Other rates for the Independents—*i.e.*, local exchange rates applicable only to an exchange area served by an Independent—are separately fixed in rate proceedings of the Independent itself and were in no way involved in the proceeding in which the June 22, 1971 order was issued. In fixing these rates the PUC necessarily considers the revenues expected from other sources, including revenues derived from the Independent's existing rates for intrastate toll service and, if applicable, multi-message unit service. (App. 118a; *see also In Re General Tel. Co.*, 92 P.U.R.3d 224 (Cal. Pub. Util. Comm'n Nov. 22, 1971), where the PUC authorized an 8.3% rate of return for petitioner General Telephone Company of California which the PUC calculated entitled that Company to an increase in annual gross revenues of $40,288,000. Of that amount, approximately $16 million was imputed to the Company through revenue to be derived from the increased toll and multi-message unit rates authorized by the PUC's order of June 22, 1971 in the *Pacific* case.)

On review, the Court below annulled the increased rates fixed for Pacific by the PUC's order of June 21, 1971. *City of Los Angeles* v. *California Pub. Util. Comm'n*, 7 Cal. 3d 331, 497 P.2d 785 (1972). (App. 1a-52a.) The only issue raised by the petitions for review and decided in that case was the level of revenues to which Pacific was entitled. This issue related to Pacific's entire intrastate revenue structure, not merely revenues derived from toll and multi-message unit service. The Court's decision was necessarily based on the facts relating to Pacific. There was no occasion to consider the situation of the Independents who were not parties to the proceeding.

Having annulled the PUC's order, the Court below remanded to the PUC with the direction to "order Pacific to make refunds in accordance with the views expressed herein." (7 Cal. 3d at 359, 497 P.2d at 806, App. 49a.) As to Pacific, this was of course quite within the Court's power. Pacific had accepted at the outset a requirement that its collection of the increased revenues should be subject to refund (App. 174a-175a), and a refund requirement directed to Pacific alone was embodied in a partial stay order of the Court below entered on July 21, 1971, the day before the increased Pacific rates were to become effective (App. 164a). As to the Independents, no such provision for a stay, refund or impoundment was ever ordered or consented to.

Nevertheless, in a decision dated August 8, 1972, the PUC not only ordered Pacific to refund all monies collected over and above its rate levels in effect prior to July 22, 1971, the effective date of the rate increase, but applied the same refund requirement to the Independents with respect to the portion of their service covered by intrastate toll rates and multi-message unit rates under the previously filed adoptions. (PUC Decision No. 80346, App. 125a-147a.)

The amount ordered to be refunded by the Independents exceeds 10 million dollars. (App. 150a.) The petitioners requested a modification, rehearing and stay of that decision, on the ground, *inter alia*, that to make the refund requirement applicable to them would deprive them of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. (Petitions for Rehearing, App. 56a, 58a, 64a, 68a, 72a-74a, 85a.) In its opinion and order on rehearing, dated March 27, 1973 (PUC Decision No. 81212, App. 148a), the PUC adhered to its position, holding that obedience to the decision of the Court below in the *Pacific* rate case required refunds by the Independents, but stayed its order pending court review (App. 167a). In their petition to the Court below for a writ of review, the petitioners again raised the federal constitutional issue, stating as one of the grounds for review that the decisions of the PUC

> "operate to deprive the independents of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution." (App. 102a; *see also*, 101a, 107a, 110a-111a, 113a.)

On September 6, 1973, the Court below entered an order denying the petition for a writ of review. (App. 163a.)

The PUC, by an order dated October 16, 1973, continued the previously granted stay as to the Independents of its refund order of August 8, 1972, pending a determination by this Court. (App. 166a-168a.)

Reasons for Granting the Writ

In approving a retroactive taking of revenues collected under PUC-approved tariffs requiring rate increases by the Independents who were never subject to any impoundment or other condition, the Supreme Court of California

has decided an important question of federal constitutional law in a way not in accord with the applicable decisions of this Court. Those decisions make it clear that such a taking of property is a violation of the due process clause of the Fourteenth Amendment.

The *prospective* application to the Independents of the lower rates provided for in the PUC's order of August 8, 1972 is of course not questioned. It is the *retroactive* application of that order to effect confiscation of revenues previously collected under unconditional tariffs prescribed by the PUC that is challenged as unconstitutional. The constitutional question is one which may recur in other jurisdictions, with potentially serious effect, if the California precedent is followed, on the financial stability of the more than 1,700 companies comprising the independent telephone industry of the United States.

ARGUMENT

The intrastate toll and multi-message unit rates established by the PUC in its decision of June 22, 1971, were final rates so far as the Independents were concerned. Collection of revenues pursuant to these approved tariff rates by the Independents was never stayed or in any way made subject to impoundment or refund. These were the only rates the Independents could lawfully charge for these types of service.

Similarly, the PUC-approved local exchange rates of each Independent were the only rates the Independent could lawfully charge for local exchange service. These rates were finally and unconditionally fixed by the PUC to provide the Independent with revennes which, together with those obtained from intrastate toll service and, in the case of General Telephone, multi-message unit service,

would yield the Independent a reasonable overall rate of return.* The local exchange rates were fixed in proceedings entirely separate from the *Pacific* proceeding. After the PUC decision of June 22, 1971 in the *Pacific* proceeding, some Independents obtained PUC rate determinations for local exchange service, and other Independents made decisions whether and to what extent to seek rate increases for such service, on the assumption that revenues for intrastate toll service would be at the increased rates fixed by the PUC in its June 22, 1971 decision.

Unlike Pacific's local exchange service rates, this important segment of the rate structure of the Independents was not at issue in the *Pacific* proceeding either before the PUC or the Court below. And in contrast to its decision regarding Pacific, the Court below did not purport to affect the PUC's determinations as to the reasonable overall rates of return for the Independents.

If allowed to stand, the PUC's subsequent refund order of August 8, 1972, as directed at the Independents, would therefore have the following effects:

(1) It would retroactively and unconstitutionally confiscate revenues lawfully collected by the Independents for intrastate toll and multi-message unit service pursuant to PUC-approved tariffs which were final and unconditional as to the Independents; and

(2) It would retroactively and unconstitutionally deprive the Independents of revenues recognized by the

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* The rate increase granted by the PUC to petitioner General Telephone Company of California on November 22, 1971 (*see* footnote on p. 4, *supra*) is presently the subject of rehearing limited solely to the issue of the appropriate rate-making treatment to be accorded the use of accelerated depreciation for income tax purposes. In all other respects, the PUC decision is final. *See* Decision No. 79431 (Cal. Pub. Util. Comm'n Nov. 30, 1971).

PUC in separate rate proceedings of the Independents as necessary to provide them with reasonable overall rates of return.

1. Retroactively Requiring the Independents to Refund Intrastate Toll and Multi-Message Unit Revenues Collected by Them Would Violate Due Process.

Revenues of a public utility collected pursuant to a commission-approved tariff, at a time when the commission's order was not stayed and the utility was not subject to any order or agreement as to impoundment for possible refund, are the property of the utility and are protected by the due process clause. Such revenues cannot constitutionally be reclaimed by retroactive rate reduction.

In *Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23 (1926), the action of the New Jersey Commission in setting rates for a telephone company below those the Commission determined would provide a reasonable return, in order to offset excessive past accumulations, was found to violate due process. This Court stated in part (at 31-32):

> "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory. . . . The revenue paid by the customers for service belongs to the company. . . . If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. . . . And the law does not require the company to give up for the benefit of future

subscribers any part of its accumulations from past operations."

This Court again condemned what amounted to a retroactive taking of revenues collected pursuant to a commission order in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932), saying (at 390):

> "Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

As is made clear in the *Arizona Grocery* case, the establishment by a commission of future rates for a utility is legislative in nature, whereas the ordering of refunds or reparations is quasi-judicial. This Court stated (at 389) that when a commission acts in a judicial capacity to order refunds, it is bound

> "to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as that of the legislature itself."

State courts generally have recognized the constitutional barrier to retroactively depriving a utility of rev-

enues collected in accordance with commission-approved rates.* They have held that when a duly empowered regulatory agency has approved a rate as reasonable, and the utility has collected revenues thereunder without any stay or any directive for impoundment or refund, the rates are final and are the only ones lawfully chargeable by the utility.**

Both the PUC and the Court below brushed aside as of no consequence the fact that the stay and the impoundment-for-refund order were directed only to Pacific and consented to only by Pacific, the sole utility respondent in the review proceeding initiated by the City of Los Angeles, et al., in the Court below. The reasoning seems to have been that since the intrastate toll rates of the Independents were the same as those of Pacific, by reason of the PUC-ordered adoptions of Pacific's rates, no consent or impoundment-for-refund order as to the Independents was necessary.

This is plainly a fallacious position. It treats identity of rates—and only partial identity at that—as synonymous with identity of parties. The power to require the Independents to adopt Pacific's rates as to portions of their service is not the power to treat the Independents as if they

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* *See, e.g., State ex rel. Boynton* v. *Public Serv. Comm'n of Kansas*, 135 Kan. 491, 11 P.2d 999 (1932); *Farmers Union Livestock Comm'n* v. *Union Pacific R.R.*, 135 Neb. 689, 283 N.W. 498 (1939); *Baltimore & O.R.R.* v. *Pennsylvania Pub. Util. Comm'n*, 136 Pa. Super. 517, 7 A.2d 488 (1939); *Georgia Pub. Serv. Comm'n*, v. *Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949); *Straube* v. *Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666 (1950).

** *See Mandel Bros., Inc.* v. *Chicago Tunnel Term. Co.*, 2 Ill.2d 205, 117 N.E.2d 774 (1954); *Keco Indus., Inc.* v. *Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465, *cert. denied*, 355 U.S. 182 (1957).

had no separate existence. Yet this is the power in effect assumed by the Court below when it allowed the 1971 impoundment-for-refund directives naming only Pacific, to be extended on August 8, 1972 to 28 other companies.

It is incorrect to assert, as did the PUC (App. 158a), that the Independents' rates were not "commission approved". By requiring the Independents to adopt the increased rates it fixed for Pacific by its order of June 22, 1971, the PUC did approve these rates for the Independents. Since the rates were unconditional as to the Independents and were not stayed, the decisions of this Court prohibit the taking of revenues collected under those rates.

2. A Retroactive Refund Order as to the Independents' Intrastate Toll and Multi-Message Unit Revenues Would Also Unconstitutionally Confiscate Revenues the PUC Determined to Be Necessary to Provide Reasonable Overall Rates of Return for the Independents.

The unconstitutionality of the action taken below is underscored by its effect on the Independents' local exchange rates, which are entirely separate from the Pacific package rates, and on the Independents' overall rates of return. Local exchange rates authorized by the PUC for the Independents after June 22, 1971 were fixed in the expectation that revenues from intrastate toll and multi-message unit services would be available at the increased rates authorized by the PUC in its June 22, 1971 decision. These local exchange rates have become final.

The decision below unconstitutionally attempts to effect indirectly that which could not be effected directly, namely retroactive removal of revenue components necessary to yield what the PUC finally determined in separate proceedings of the Independents to be reasonable rates of re-

turn. This Court found a similar attempt to impose a confiscatory rate of return constitutionally impermissible. *See Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 31 (1926).

The constitutional defect in the PUC's refund order to the Independents is incurable and the damage irremediable. Neither California law nor the United States Constitution would permit this confiscation to be recompensed by now increasing local exchange rates above the level necessary to provide a reasonable rate of return, since that would amount to recouping past losses by placing an artificial component in a prospective rate. *See City of Los Angeles* v. *California Pub. Util. Comm'n*, 7 Cal.3d 331, 497 P.2d 785 (1972); App. 41a-49a; California Public Utilities Code, §§ 728, 734; *Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 31-32 (1926).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of California.

Respectfully submitted,

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APPENDIX

Majority, Concurring and Dissenting Opinion in City of Los Angeles v. California Public Utilities Commission

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CITY OF LOS ANGELES ET AL.,
Petitioners,

v.

PUBLIC UTILITIES COMMISSION ET AL.,
Respondents;

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Real Party in Interest.

WILLIAM M. BENNETT ET AL.,
Petitioners,

v.

PUBLIC UTILITIES COMMISSION,
Respondent;

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Real Party in Interest.

CALIFORNIA PUBLIC INTEREST LAW CENTER ET AL.,
Petitioners,

v.

PUBLIC UTILITIES COMMISSION,
Respondent;

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Real Party in Interest.

S. F. 22832, 22828 and 22833.

Majority, Concurring and Dissenting Opinion in City of Los Angeles v. California Public Utilities Commission

Supreme Court of California,
In Bank.

June 9, 1972.

As Modified on Denial of Rehearing
July 12, 1972.

Consolidated proceeding to review decision of Public Utilities Commission authorizing intrastate telephone rate increases. The Supreme Court, Peters, J., held that where portions of Public Utilities Commission's decision dealing with treatment of federal and state tax expense, adjustment of price paid for equipment to related corporation and certain capital expenditures which did not increase revenue could not be sustained on the record and it was possible that amount of money involved was equal to or exceeded the amount of the increase, the order increasing rates must be annulled in its entirety and Commission must reinstate rates of its last preceding lawful order, but it might grant interim rate increases upon appropriate findings.

Mosk, J., filed concurring and dissenting opinion.

Schauer, retired Associate Justice of Supreme Court, sat under assignment by Chairman of the Judicial Council.

1. *Public Service Commissions* [7.1, 18]

Public Utilities Commission in rate-making proceeding has discretion to determine factors material to public convenience and necessity but is required to state what those factors are and to make findings on material issues which ensue from the factors. West's Ann.Public Util.Code, § 1705.

Majority, Concurring and Dissenting Opinion in City of Los Angeles v. California Public Utilities Commission

2. *Telecommunications* [343]

Where Public Utilities Commission, in connection with issuing telephone rate order, followed its tax expense decision in earlier proceeding, but that decision was annulled and, unless the rate order were annulled, rate would become lawful and all funds collected pursuant to order would belong to telephone company and not be subject to refund, the order must be annulled. West's Ann.Public Util.Code, § 1705.

3. *Telecommunications* [343]

Where sole basis for accounting and rate-making treatment of state taxes of telephone company was the annulled decision in another case as to treatment of federal taxes, decision in telephone company case, to extent it related to the state taxes, could not be sustained. West's Ann.Public Util.Code, § 1705.

4. *Telecommunications* [341]

Public Utilities Commission's decision as to accounting and rate-making treatment for state taxes of telephone company could not be upheld on theory that the amount involved was insignificant, where it appeared that on basis of that decision there might be rate increases amounting to $200,000,000 in the following ten years. West's Ann.Public Util.Code, § 1705.

5. *Telecommunications* [341]

Public Utilities Commission's treatment, for accounting and rate-making purposes, of state taxes on basis of accelerated depreciation with normalization could not be upheld

on theory of administrative convenience where no additional computations would be required to apply accelerated depreciation with flow through. West's Ann.Public Util. Code, §1705.

6. *Telecommunications* [319]

Goal of uniformity between treatment of federal and state tax expense did not justify treatment of state tax of telephone company on basis of accelerated depreciation with normalization in rate-making decision, where federal and state law were not the same as to use of accelerated depreciation, there was potentially a large amount of money involved in increased rates that would result from such treatment of state tax expense and there was no administrative inconvenience in applying instead accelerated depreciation with flow through. West's Ann.Public Util.Code, § 1705.

7. *Telecommunications* [319]

Telephone company's adherence to ordinary principles of accelerated depreciation with flow through with regard to state taxes for purposes of rate-making would not have jeopardized its federal tax benefits that would result if normalization method of accounting could be used. 26 U.S.C.A. (I.R.C.1954) §§ 167(*l*) (2, 3) (G), (*l*) (3).

8. *Corporations* [1.6(*l*)]

Where it appears that utility is dominant, it may not through use of corporate instrumentalities obtain a greater rate of return than it would be entitled to in the absence of such; it is not determinative whether the prices charged by one affiliated corporation to another might be considered

reasonable; the utility enterprise must be viewed as a whole without regard to the separate corporate entities and rate of return should be the same for the entire utility enterprise.

9. *Telecommunications* [317]

Where parent corporation was designer, engineer, manufacturer, distributor, installer, repairer and operator of 80% of telephone business in entire continental United States, telephone equipment manufacturer was wholly owned subsidiary and parent held 90% voting control of operating utilities company, the manufacturer was not entitled to greater rate of return on its sales to the utility, for purposes of fixing utility's rates, than that utility was entitled to earn in its operations, even if manufacturer's prices were reasonable when compared to other manufacturing enterprises. West's Ann.Public Util.Code, § 1705.

10. *Telecommunications* [317]

In determining rate of telephone company which was part of a utility enterprise, increased rate of return permitted for activities of supplier of telephone equipment, under the part of the utility enterprise could not be sustained on theory that it represented a reward for efficiency, where commission failed to specify any amount of such reward and there was no way of determining amount of increase rate of return permitted as reward for efficiency from part of increase due to other factors. West's Ann.Public Util. Code, § 456.

11. *Public Service Commissions* [18]

When Public Utilities Commission sees fit to permit a reward for efficiency pursuant to public utilities code, it

must specify the amount of the reward, since, if it fails to do so, it becomes impossible to review the decision of the Commission and, in addition, rate payers are entitled to know amount of any reward included in their rate, since it is their money that is being used for the reward. West's Ann.Public Util.Code, § 456.

12. *Telecommunications* [330]

Evidence supported Public Utilities Commission's finding as to amount of expenditure by telephone company for improvements which would not be expected to produce any substantial increase in revenues, which were important part of revenue producing system and which were used to increase average year rate base in determining telephone rates. West's Ann.Public Util.Code, § 1705.

13. *Telecommunications* [313, 315]

Within rule that Public Utilities Commission in ratemaking determines revenues, expenses and investments for test year and adjusts test period results to allow for reasonably anticipated changes in revenues, expenses, or other condition, so that the test period results of operations will be as nearly representative of future conditions as possible, the Commission may not adjust one side or part of the equation without adjusting the other, unless there is a finding that the particular expenditure is extraordinary. West's Ann.Public Util.Code, § 1705.

14. *Telecommunications* [313]

In determination by Public Utilities Commission of telephone rates, wherein there was no finding that certain

telephone company investment which would not produce increased revenues was extraordinary or that the anticipated increase in revenues for future years were insufficient to offset anticipated increase in expenses and investment, commission was not justified in adjusting the average year rate base to reflect such investments by "rolling back" such investment into the test year. West's Ann.Public Util. Code, § 1705.

15. *Telecommunications* [313]

For purposes of determining rate for telephone company, adjustment of average year rate base to reflect capital expenditures which would not increase revenue was not warranted to offset effects of inflation. West's Ann.Public Util.Code, § 456.

16. *Telecommunications* [316]

Rate of return of 7.85% for telephone company, with 9.5% on common equity, was within range of reasonableness and Public Utilities Commission did not abuse its discretion in fixing such rate. West's Ann.Public Util.Code, § 456.

17. *Telecommunications* [317]

Since, in light of dominance of telephone system and its integrated position, utility enterprise must be viewed as a whole without regard to separate corporate entities, Public Utilities Commission, in setting rates for subsidiary telephone company, properly used actual costs of basic research, assistance in engineering, legal, accounting, financing and other services rendered by parent to subsidiary,

rather than the one percent of subsidiary's gross revenue paid to parent for such services. West's Ann.Public Util. Code, § 456.

18. *Telecommunications* [321]

Increase in basic charge for "life line service" to telephone subscribers from $2.25 per month, with message allowance of 30 units, to $2.95 with message allowance of 20 could not be sustained on the record.

19. *Telecommunications* [261]

Public Utilities Code authorizes Commission to order telephone company to make changes to secure adequate service or facilities. West's Ann.Public Util.Code, §§ 761, 762.

20. *Telecommunciations* [336]

Upon Public Utilities Commission finding that plant additions of at least $750,000,000 per year by telephone company for the following three years would decrease likelihood of service problems, Commission had authority to order telephone company to install $750,000,000 of plant additions for each of the three years, especially since Commission had power to review specific expenditures made from the gross amount and to disallow as an expense any which it considered unjustified or wasteful. West's Ann.Public Util. Code, §§ 761, 762.

21. *Telecommunications* [336]

Public Utilities Commission's findings that plant additions of at least $750,000,000 per year by telephone company

for following three years would decrease likelihood of service problems was sufficiently specific to satisfy requirements of section of Public Utilities Code providing that Commission's decision in rate-making case shall contain, separately stated, findings of fact and conclusions of law on all issues material to the order or decision. West's Ann. Public Util.Code, §§ 761, 762, 1705.

22. *Public Service Commissions* [24]

When conflicting evidence is presented from which conflicting inferences can be drawn, the Public Utilities Commission's findings are final. West's Ann.Public Util.Code, §§ 761, 762, 1705.

23. *Telecommunciations* [313]

Even though telephone company was monopoly with captive consumers, expenditure for advertising which should result in reductions in operating costs and more efficient service to rate payer were reasonable operating expenses and properly allowed in rate-fixing case. West's Ann.Public Util.Code, §§ 761, 762.

24. *Telecommunications* [330]

Evidence supported increase in telephone company's rate and installation charges for equipment and service functions. West's Ann.Public Util.Code, §§ 761, 762.

25. *Telecommunications* [33]

Where petitioner had been issued three subpoenas to compel attendance of telephone company's president and two other corporate officers at public hearings involving

telephone rates increases but had delayed service subpoenas for 14 days until eve of the return date, Public Utilities Commission did not abuse its discretion in quashing subpoenas on ground they had not been properly served. West's Ann.Code Civ.Proc. § 1987.

26. *Public Service Commissions* [21]

Innuendos of misconduct, in absence of specific allegations, were insufficient basis for review of propriety of meeting of Public Utilities Commissioners at an airport on July 4 in connection with filing of amended petition for rehearing of Commission's decision in rate case. West's Ann.Public Util.Code, § 306.

27. *Telecommunications* [344]

Once it had been determined that telephone rate increases were invalid, increases could not be continued in effect until Public Utilities Commission established new rates.

28. *Telecommunications* [343, 344]

Where, in telephone rate case, portions of Public Utilities Commission's decision dealing with treatment of federal and state tax expense, adjustment of price paid for equipment to related corporation and certain capital expenditures which did not increase revenue could not be sustained on the record and it was possible that amount of money involved was equal to or exceeded the amount of the increase, the order increasing rates must be annulled in its entirety and Commission must reinstate rates of its last preceding lawful order, but it might grant interim rate increases upon appropriate findings. West's Ann.Public Util.Code, § 1705.

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29. *Public Service Commissions* [7.1]

Public Utilities Commission has power to prescribe rates prospectively only and Commission cannot, even on grounds of unreasonableness, require refunds of charges fixed by formal finding which has become final. West's Ann.Public Util. Code, § 728.

30. *Telecommunications* [343]

Where telephone rate increases authorized by Public Utilities Commission were annulled, telephone company was not entitled to have case remanded to Commission to set a new lawful rate and to have refunds limited to difference, if any, between rate set in decision and rate set in the further proceedings, inasmuch as that would involve proscribed retroactive rate-making. West's Ann.Public Util. Code, § 728.

William M. Bennett, in pro. per.

Roger Arnebergh, City Atty., Charles E. Mattson, Deputy City Atty., John W. Witt, City Atty., William H. Kronberger, Jr., Deputy City Atty., Thomas M. O'Connor, City Atty., Milton H. Mares and William F. Bourne, Deputy City Attys., W. Keith Woodmansee, Walnut Creek, Michael M. Stein, Beverly Hills, and Rinaldo S. Brutoco, Los Angeles, for petitioners.

Mary Moran Pajalich and Timothy E. Treacy, San Francisco, for respondents.

PETERS, Justice.

In these consolidated proceedings we review Decision No. 78851 of the Public Utilities Commission which authorizes

intrastate telephone rate increases in the amount of $143 million annually. We have issued a partial stay providing that all sums collected by Pacific Telephone and Telegraph Company pursuant to the rates authorized by the decision shall be subject to refund in whole or in part upon order of this court should the decision or Decision No. 77984 of the commission be annulled or modified. The latter decision, which related to the calculation of Pacific's federal income tax expense for rate making purposes was rendered during the course of the proceedings which subsequently resulted in the instant rate decision, and we recently annulled the tax expense decision in City & County of San Francisco v. Public Utilities Com., 6 Cal.3d 119, 98 Cal.Rptr. 286, 490 P.2d 798.

In Pacific Tel. & Tel. Co. v. Public Util. Com., 68 Cal.2d 634, 644-645, 44 Cal.Rptr. 1, 7, 401 P.2d 353, 359 the commission's general approach was described as follows: "It appears that in telephone rate proceedings in California the general approach employed by the commission, and followed in the present case, is to determine with respect to a 'test period' (1) the rate base of the utility, i.e., value of the property devoted to public use, (2) gross operating revenues, and (3) costs and expenses allowed for rate-making purposes, resulting in (4) net revenues produced, sometimes termed 'results of operations.' Then, by determining the fair and reasonable rate of return to be fixed or allowed the utility upon its rate base, and comparing the net revenue which would be achieved at that rate with the net revenue of the test period, the commission determines whether and how much the utility's rates and charges should be raised or lowered. . . . The test period is chosen with the objective that it present as nearly as possible the operating condi-

tions of the utility which are known or expected to pertain during the future months or years for which the commission proposes to fix rates. The test-period results are 'adjusted' to allow for the effect of various known or reasonably anticipated changes in gross revenues, expenses or other conditions, which did not obtain throughout the test period but which are reasonably expected to prevail during the future period for which rates are to be fixed, so that the test-period results of operations as determined by the commission will be as nearly representative of future conditions as possible."

The same general approach was followed in the instant proceedings, using 1970 as the test year.

In 1961, section 1705 of the Public Utilities Code was amended to provide that ". . . the commission shall make and file its order, containing its decision. The decision shall contain, *separately stated, findings of fact and conclusions of law* by the commission *on all issues material to the order* or decision. . . ." Italics added.)

[1] In California Motor Transport Co. v. Public Utilities Com., 59 Cal.2d 270, 273-275, 28 Cal.Rptr. 868, 870, 379 P.2d 324, 326, this court reviewed a commission order applying the new scope of review dictated by the amendment of section 1705. We held that a finding of "public convenience and necessity" was an ultimate finding and that to be sustained by the court "[e]very issue that must be resolved to reach that ultimate finding is 'material to the order . . . .'" and must be separately stated. The decision left to the commission the discretion to determine the factors material to public convenience and necessity but held that section 1705 requires it to state what those factors are and to make findings on the material issues which ensue from the factors.

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It has been repeatedly emphasized that separate findings are essential to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action." (Greyhound Lines, Inc. v. Public Utilities Com. 65 Cal.2d 811, 813, 56 Cal. Rptr. 484, 485, 423 P.2d 556, 557; Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 648, 44 Cal.Rptr. 1, 401 P.2d 353; California Motor Transport Co. v. Public Utilities Co., *supra*, 59 Cal.2d 270, 274-275, 28 Cal.Rptr. 868, 379 P.2d 324.) We must review the findings accordingly.

FEDERAL TAX EXPENSE

[2] Our decision annulling the commission's tax expense decision in City & County of San Francisco v. Public Utilities Com., *supra*, 6 Cal.3d 119, 98 Cal.Rptr. 286, 490 P.2d 798, was filed after the commission had established the rates before us. The commission in the instant decision in fixing the amount of Pacific's federal tax expense followed its tax expense decision. Since the latter decision was annulled, the instant decision must also be annulled.[1]

[1] It is not clear how much of the $143 million annual increase is due to the commission's change in the treatment of federal tax expense. As pointed out in our opinion in City & County of San Francisco v. Public Utilities Com., *supra*, 6 Cal.3d 119, 125, 98 Cal.Rptr. 286, 490 P.2d 798, the commission refused to take evidence. The dissenting commissioners in Decision No. 77984, *supra*, estimated that the increased rates in the next 10 years due to the commission's tax expense decision would be between 750 million and one billion dollars.

The fact that the commission reopened the proceedings with respect to the question of federal income tax expense after our decision does not militate against this conclusion. In Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 649-656, 44 Cal.Rptr. 1, 401 P.2d 353, the commission commenced an investigation into the lawfulness of Pacific's rates, after lengthy hearings it concluded that the rates were excessive, it ordered new, lower rates, and it ordered a refund of excessive rates in the amount of $80 million collected by Pacific during the pendency of the rate proceedings. We annulled the refund order on the ground that general rate making is legislative and looks to the future, that the Legislature has authorized rate changes only for the future, and that the commission did not have power to order refunds on the ground of unreasonableness where the rate had been previously found to be reasonable. It follows that, unless the rate order now before us is annulled, it will become a lawful rate and that all funds collected pursuant to it would belong to Pacific and not be subject to refund.

In other words, we must annul the rate order now before us, because otherwise the rates therein, which are based in part on the annulled tax expense decision, will become lawful rates for the future and will preclude refunds.

STATE TAX EXPENSE

The commission concluded that for purposes of computing the expense allowance for Pacific's state corporation franchise tax liability, it would follow the same accounting procedures as to depreciation as the federal tax expense computation, i.e., accelerated depreciation with nor-

malization. Under the commission's 1968 decision, the accounting procedure followed was imputed accelerated depreciation with flow through.

Accelerated depreciation for tax purposes results in a tax saving or deferral. (See City & County of San Francisco v. Public Utilities Com., *supra*, 6 Cal.3d 119, 123, 98 Cal.Rptr. 286, 490 P.2d 798.)

The problem presented is whether the tax saving or tax deferral should inure to the benefit of the ratepayer in the form of lower rates or whether the tax saving or deferral should be retained by the utility with no reduction in rates. When the saving is passed on to the ratepayer, the accounting procedure is called accelerated depreciation with flow through.[2] When the saving is retained by the utility, the accounting procedure is called accelerated depreciation with normalization.[3]

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[2] Apparently, all utilities in California except Pacific and General Telephone follow accelerated depreciation with flow through as to both federal and state income tax expense. Pacific and General Telephone have apparently in the past used straight line depreciation. In 1968, the commission, recognizing that it could not compel Pacific and General Telephone to change its tax practices, nevertheless concluded that the two corporations were acting imprudently and determined that for purpose of rates, it would *impute* accelerated depreciation to them with flow through of the *imputed* tax savings to the ratepayer.

[3] Accelerated depreciation with normalization means that the utility pays its income or franchise tax on the basis of accelerated depreciation. The commission, for rate purposes, then recomputes what would have been the tax liability if straight line had been used, and this amount is treated as the tax expense to be recovered by the utility through its rates as an expense of doing business. The difference between the actual liability for taxes of the corporation and the recomputed taxes on the basis of straight line is then set up on the books as a reserve for deferred taxes.

The system followed by nontelephone utilities, accelerated depreciation with flow through, is that the utility pays taxes on the basis

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In the decision which we annulled the commission held that Pacific's *federal* income tax expense would be computed for rate making purposes on the basis of accelerated depreciation with normalization, and in the instant decision the commission concluded that *state* corporation tax expense would also be computed on the basis of accelerated depreciation with normalization.[4] The commission reasoned: "If Pacific were to adopt 'flow-through' accounting for state income taxes using accelerated depreciation, it would not appear to be in compliance with the prerequisite in the Internal Revenue Code that a taxpayer such as Pacific must use the 'normalization method of accounting' to qualify for the use of accelerated depreciation for federal income tax purposes. In any event, the state income taxes are a relatively small portion of total income taxes paid by Pacific. Under these circumstances it is not warranted to consider different accounting and rate-making treatment for state than for federal taxes. We find that the staff was correct in basing its determination of revenue requirement in Exhibit No. 66 on the use of normalization for both state and federal

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of accelerated depreciation and the actual tax expense is the amount allowed as tax expense for rate purposes.

The third system, *imputed* accelerated depreciation with flow through, which was applied to Pacific and General Telephone in 1968, is that the utility pays its taxes on the basis of straight line depreciation but the commission recomputes those taxes as if accelerated depreciation had been used, and only this latter figure is allowed as a tax expense for rate purposes.

[4] The federal tax expense decision was based on a change in federal tax law. There has been no comparable change in our corporate franchise tax law. Thus, the commission could not and did not in the instant decision rely on the grounds in the federal decision.

income taxes. This avoids the possibility of jeopardizing the much larger federal income tax deferrals."

[3] The above quoted matters constitute the only discussion by the commission of the depreciation allowance as to state corporation franchise taxes. We have annulled the decision of the commission establishing accelerated depreciation and normalization as the method of computation of federal tax expense in City & County of San Francisco, *supra*. Since the sole basis for the instant decision as to state taxes was the annulled decision as to federal taxes, the instant decision, to the extent it relates to the state taxes, cannot be sustained.

Moreover, even if the decision as to the treatment of federal taxes had been permitted to stand, the commission's determination as to state taxes could not be upheld.

[4] The commission's decision may not be upheld on the theory that the amount involved is insignificant. The commission's Table II, Results of Intrastate Operations Under Present Rates—Test Year 1970, reflects that for the test year the adopted federal taxes were $101,800,000 and the adopted state taxes were $19 million. Thus the ratio is approximately five to one. It seems reasonable to assume that the same ratio would apply with regard to tax savings. Thus under the $750 million to $1 billion estimate of rate increase in the next 10 years due to the federal tax decision, there may be rate increases amounting to $200 million in the next 10 years due to the instant decision's treatment of state tax expense. There is no showing before us which would warrant the conclusion that the amount of money involved is negligible; the commission, so far as appears, did not take evidence as to

the effect on state tax expense of the instant decision as compared to alternative treatment. Accordingly, it would be improper to assume that only a trivial amount of money is involved, and the commission's decision cannot be upheld on the theory that the importance of the decision as to state tax treatment is minimal.

[5] Nor may the commission's state tax treatment be upheld on a theory of administrative convenience. No additional computations are required to apply accelerated depreciation with flow through. Pacific will be paying its taxes on the basis of accelerated depreciation, and this figure would thus be readily available. Moreover, in order to establish the tax reserve used in normalization, it is essential to calculate in the rate books the tax which will be paid on the basis of accelerated depreciation and which would have been due without accelerated depreciation. (See fn. 3.)

[6] Although the goal of uniformity between treatment of federal and state tax expense may sometimes furnish a basis for adoption of particular rate procedures, uniformity does not justify the state tax treatment adopted by the commission. As pointed out above, federal law and state law are not the same with respect to the use of accelerated depreciation. Thus, the same considerations do not apply. In the light of the potentially large amount of money involved and the lack of any administrative inconvenience, the limited uniformity sought by the commission as to depreciation would not justify the substantial departure from ordinary principles of rate making.[5]

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[5] We pointed out in City & County of San Francisco, *supra*, that the general rule followed by all nontelephone utilities is accelerated

[7] We cannot agree that to adhere to the ordinary principle of accelerated depreciation with flow through with regard to state taxes would jeopardize Pacific's federal tax benefits.[6]

Section 167(*l*) (2) of the Internal Revenue Code, as amended in 1969, provides: "In the case of any post-1969 public utility property, the term 'reasonable allowance' [for depreciation] as used in subsection (a) means an allowance computed under—

"(A) a subsection (*l*) method [straight line depreciation (see Int.Rev. Code, § 167, subs. (*l*) (3) (f))],

"(B) a method otherwise allowable under this section [such as accelerated depreciation] *if the taxpayer uses a normalization method of accounting,* or

"(C) the applicable 1968 method, if, with respect to its pre-1970 public utility property of the same (or similar) kind most recently placed in service, the taxpayer used a flow-through method of accounting for its July 1969 accounting period." (Italics added.)

Subsection (*l*) (3) (G) defines normalization: "In order to use a normalization method of accounting with respect to any public utility property—

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depreciation with flow through. Thus the instant decision represents a departure from the basic principle governing treatment of tax expense. (6 Cal.3d at pp. 124, 129, 98 Cal.Rptr. 286, 490 P.2d 798.)

[6] We assume for the purpose of discussion and contrary to fact that we affirmed the federal tax decision of the commission. Of course we annulled it. Since the commission must reconsider the federal tax treatment it is only speculative that there will be any federal tax benefits for Pacific.

"(i) the taxpayer must use the same method of depreciation to compute both its tax expense and its depreciation expense for purposes of establishing its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account, and

"(ii) if, to compute its allowance for depreciation *under this section*, it uses a method of depreciation other than the method it used for the purposes described in clause (i), *the taxpayer must make adjustments to a reserve to reflect the deferral of taxes resulting from the use of such different methods of depreciation.*" (Italics added.)

When section 167(*l*) (3) (G) (ii) is read as a whole, it is clear that the reserve for deferred taxes need only reflect the deferral of taxes resulting from the use of "such" different methods of depreciation and that such different methods of depreciation mean the difference in the allowance for depreciation "under this section." The term "under this section," of course, refers only to federal taxes and not to state taxes.

For the foregoing reasons, the computation of state tax expense cannot be sustained.

THE WESTERN ELECTRIC ADJUSTMENT

In prior rate proceedings involving Pacific, the commission generally adopted certain adjustments to Pacific's plant and expenses to establish lower prices than those actually charged Pacific by its affiliated manufacturer, Western Electric Company, Inc. Western is a wholly owned subsidiary of American Telephone and Telegraph Company, and American holds 90 percent voting control of Pacific. The reductions were based on the theory that Western should be entitled to no greater rate of return than would be reasonable for a regulated utility.

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In the instant decision, the commission concluded that no adjustment should be made. The commission refused to make the adjustment not only as to current purchases by Pacific from Western but also refused to make the adjustment with respect to equipment and plant purchased prior to 1968, the last year the adjustment was made in setting Pacific's rates.

The commission pointed out that Western during the years 1946 through 1969 had received a return on net equity from its Bell System operations of 10.1 to 10.2 percent. (This, of course, is substantially higher than the return permitted Pacific during the period or in the current proceeding.) The commission found that Western was efficiently operated, and pointed out that section 456 of the Public Utilities Code permits incentives and rewards for a more efficient management of an enterprise.[7]

The basis of the commission's decision is that, as to the activities of Western, a rate of return should be permitted commensurate to an ordinary manufacturer's rate of return and that when Western is permitted such return, its prices were reasonable.[8]

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[7] Section 456 of the Public Utilities Code provides: "Nothing in this part shall be construed to prohibit any public utility from profiting, to the extent permitted by the commission, from any economies, efficiencies, or improvements which it may make, and from distributing by way of dividends, or otherwise disposing of, such profits. The commission may make or permit such arrangement with any public utility as it deems wise for the purpose of encouraging economies, efficiencies, or improvements and securing to the public utility making them such portion of the profits thereof as the commission determines."

[8] The commission reasoned: "The intent of Section 456 also should apply to an affiliate of a California utility. It is quite possible that the risks inherent in the manufacturing operations and in the service and supply operations of Western Electric are not

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We extensively considered the Western Electric adjustment in Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 659-662, 44 Cal.Rptr. 1, 401 P.2d 353. We set forth the commission's findings as to the corporate affiliation of Pacific, Western, and American, as to the dominance of the Bell System in providing telephone service, and as to its advantage in its integrated position of being researcher, designer, engineer, manufacturer, distributor, installer, repairer, junker, and operator of 80 percent of the telephone business in the entire continental United States. Those findings were not disputed by Pacific.

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quite as great as the operating risks of some of the manufacturers used in the comparative data presented in this proceeding. There is no question, however, that the capital structure of Western Electric is similar to that of manufacturers. There is also ample evidence that Western Electric has been operated in an extremely efficient manner, as compared with other enterprises. Considering the risks and efficiencies of Western Electric's total operations, we deem it reasonable for Western Electric to have earned the returns it realized from 1946 through 1969. No adjustment to the prices charged Pacific for products and services during that period is warranted.

"Further tests of reasonableness are appropriate in reviewing the manufacturing functions and the service and supply functions performed by Western Electric. Also, although manufacturing is not a normal function of a utility, such service and supply functions as purchasing from other manufacturers, storekeeping, installing, repairing and salvaging are normal utility functions. Even though Western Electric did not earn an unreasonably high return on its operations, a downward adjustment in prices charged would be appropriate if Western Electric prices for manufactured products were higher than similar products manufactured by others or if Pacific could perform the service and supply functions at lower cost than the charges by Western Electric. . . . Exhibits Nos. 8 and 8-A show that it would cost at least $14,500,000 more per year for Pacific to duplicate the service and supply functions now performed by Western Electric. These exhibits confirm that no adjustment to Western Electric prices for manufactured products or for services and supplies is warranted at this time."

We concluded: "The determination of the commission in the present case that Western is entitled to no greater return on its sales to Pacific than Pacific is entitled to earn on its operations, and that American should not be permitted through the corporate instrument of Western to subject Pacific's ratepayers to the burden of providing a greater return, is based not only on extensive findings made by the commission on the subject but also on the methods and principle theretofore followed by the commission . . . and as the commission expressly found herein, produces a fair and reasonable result." (62 Cal.2d at pp. 661-662, 44 Cal.Rptr. at p. 18, 401 P.2d at p. 370). We rejected Pacific's contention that it was error for the commission to omit "to include a finding of fact as to the reasonableness or prudence of Pacific's purchases from Western and payment of the prices charged, . . ." (62 Cal.2d at p. 661, 44 Cal.Rptr. at p. 18, 401 P.2d at p. 370.)

[8] We thus determined that, where it appears that a utility enjoys the dominant position shown by the commission's findings, it may not through the use of corporate instrumentalities obtain a greater rate of return than the utility would be entitled to in the absence of the separate corporate entities, and it was not determinative whether the prices charged by one affiliated corporation to another might be considered reasonable. In other words, the utility enterprise must be viewed as a whole without regard to the separate corporate entities, and the rate of return should be the same for the entire utility enterprise.

[9] We see no reason to depart from our holding. A corporation should not be permitted to break up the utility enterprise by the use of affiliated corporations and thereby

obtain an increased rate of return for its activities. In the light of the dominance of the Bell System and its integrated position, we again reject the view that a finding of the reasonableness or prudence of Pacific's purchases from Western would warrant termination of the Western Electric adjustment.

There has been no substantial change since our prior decision as to the dominance of the Bell System or as to the relationship between Pacific, American, and Western. Accordingly, Western must be considered part of the utility enterprise, and its prices should be adjusted to reflect no greater rate of return on its sales to Pacific than Pacific is entitled to earn on its operations. This result cannot be avoided on the basis of a finding that Western's prices were reasonable when compared to other manufacturing enterprises.

[10, 11] The increased rate of return permitted for Western activities may not be sustained on the record before us on the theory that it represents a reward for efficiency. When the commission sees fit to permit a reward for efficiency pursuant to section 456 of the Public Utilities Code (see fn. 7), it must specify the amount of the reward. If the commission. in permitting a reward, fails to specify the amount of the reward, it becomes impossible to review the decision of the commission. Thus, in the instant case, there is no way of separating out the amount of the increased rate of return permitted as a reward for efficiency and no way of determining what part of the increase is due to other factors. In addition, the ratepayers are entitled to know the amount of any rewards included in their rates since it is their money that is being used for the reward.

When the commission determines to give away ratepayers' money, it must at least tell the donors how much they are giving.

NEW NONREVENUE PRODUCING CAPITAL EXPENDITURES

The commission followed its usual practice in calculating the rate base for the test year 1970 by using an average year rate base. However, the commission then adjusted the figure to reflect that $75 million of 1970 capital expenditures and $80 million of 1971 capital expenditures would be nonrevenue producing. The commission increased the rate base on the basis of those figures in arriving at a pro forma rate base. Also the commission adjusted the depreciation expense, ad valorem taxes, and income taxes.

An executive of Pacific testified that there would be discretionary investment in 1970 and 1971 in the above amounts. The discretionary items were identified as improvements in the service which apparently were not immediately necessary but would be necessary in the long run. The executive listed such items as replacement of older offices, centralized automatic call distributing systems, broad band restoration which permits quicker restoration of service when there is a wreck or fire, improvement of coin boxes so as to better withstand vandalism, undergrounding in residential areas, improved pressurization of cables, and new items of station equipment.

Although the witness did not identify these investments as nonrevenue producing investments but rather as discretionary investments in the sense that they were not required by commission order or to maintain service, it seems apparent that most of the items would not be expected to produce any substantial increase in revenues.

[12] The commission's categorization of nonrevenue producing investment is probably a misnomer; the investments are an important part of the revenue producing system, and it would seem more appropriate to term the investments as investments which will not *increase* revenues rather than nonrevenue producing. With this qualification, the evidence is sufficient to support the commission's finding as to the *amount* of *expenditure* for "nonrevenue" improvements, and the contention that the evidence is insufficient must be rejected.

It is also claimed that the findings of the commission are insufficient to justify the adjustment of the rate base and expenses. The commission stated: "In Exhibits Nos. 75 and 102, Pacific includes alternative 1970 results of operation using a weighted average rate base and a year-end rate base. Pacific contends that the use of a year-end pro forma rate base is justified in this proceeding to offset the erosion of rate of return which is the inevitable effect of inflation. Pacific points out that the Commission frequently has made an allowance in rate of return to take care of anticipated attrition in earnings which results primarily from inflation.

"We do not agree that the use of a year-end rate base necessarily is appropriate. For example, if all of the capital additions installed by a utility during the year are directly related to providing service to new customers, the additional net revenues to be received from those new customers normally should also be reflected in the test year if a year-end rate base is to be used. On the other hand, we often have utilized a rate base which was higher than either a weighted average or a year-end rate base when installation of nonrevenue-producing plant is imminent. In such cases, the

additional plant would be completed before or soon after the new utility rates became effective. Not only would there be no offsetting additional net revenues available to offset the higher investment, there would be additional expenses. Unless the non-revenue-producing plant and related depreciation expense and taxes were 'rolled back' into the test year, the utility would never achieve the rate of return found reasonable by the Commission.

"To determine the rate of return for the test year 1970 for rate-making purposes we will consider how much additional non-revenue-producing plant will have been installed by the approximate midpoint of the first 12 months that the new telephone rates have been in effect. Undisputed testimony of Pacific's vice president in charge of operations shows that about 75 million dollars of 1970 capital expenditures and 80 million dollars of 1971 capital expenditures are essentially non-revenue-producing. Only about half of those 1970 expenditures and none of the 1971 expenditures would be reflected in a weighted average 1970 rate base and corresponding net revenue. When we 'roll back' into the 1970 test year all such non-revenue-producing plant that will have been installed by the end of 1971, including the effect of additional depreciation expense and additional ad valorem taxes, offset in part by lower income taxes which result from the higher assumed expenses and bond interest, the end result should be reasonably close to the return which will be realized by Pacific during the first 12-month period that the new telephone rates are in effect."

[13] The basic approach of the commission in rate making, as pointed out at the beginning of this opinion, is to take a test year and determine the revenues, expenses, and

investment for the test year. We pointed out in Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 645, 44 Cal.Rptr. 1, 7, 401 P.2d 353, 359, that the test period results are adjusted to allow for reasonably anticipated changes in revenues, expenses, or other conditions "so that the test-period results of operations as determined by the commission will be as nearly representative of future conditions as possible." Within this rule, the commission may adjust all figures, revenue, expense, and investment for anticipated changes but it may not adjust one side or part of the equation without adjusting the other unless there is a finding that the particular expenditure is extraordinary. This was recognized by the commission when it pointed out that it would not be proper to change from a weighted average rate base to a year-end rate base without also adjusting revenues to reflect new customers.

[14] In the instant case, the commission did not find that the investment which would not increase revenue was extraordinary in comparison to past practice. To the contrary, the commission reasoned that the investment must always be " 'rolled back' " into the test year. The commission reasoned that unless the adjustment was made Pacific would never achieve the reasonable rate of return. This is only true if the increased revenues expected in the future will not be sufficient to offset this investment and other increased investment and expenses. But there is no finding that the anticipated increase in revenues will not offset all of the increased investment and expenses. In the absence of a finding that the investment which would not increase revenue is extraordinary or that the anticipated increase in revenue will not be sufficient to offset all anticipated in-

creases in expenses and investment, there is no basis for adjusting the test year figures.

Under the findings made, we have no way of knowing whether the discretionary investment should be considered large in comparison to prior years when viewed either as to dollars to be spent or in relation to total investment. It may be that in comparison to prior years, the $75 or $80 million figures are not large because similar amounts were spent on discretionary investment in prior years. The $75 and $80 million figures represent approximately 10 percent of the anticipated total of all investments to be made by Pacific in 1970 and 1971, and it may well be that more than 10 percent of the rate base for the test year was based on discretionary investment. If so, it would seem that any adjustments to be made should be made in the direction opposite to that followed by the commission. In any event, any adjustment to be made should be made only for that portion of the investment which may be deemed extraordinary. Since there is no finding that the investment which will not produce increased revenues is extraordinary or that the anticipated increased revenues for future years are insufficient to offset anticipated increased expenses and investment, the findings are insufficient to support the adjustment.

[15] Pacific argues that the adjustment is warranted to offset the effects of inflation. But the two matters are essentially unrelated. Discretionary expenditures may increase or decrease without regard to whether there is inflation or deflation. Moreover, the commission did not rely on the inflation argument.

RATE OF RETURN

[16] The commission fixed the permissible rate of return at 7.85 percent (with 9.5 percent on common equity) which was a substantial increase over the prior rate order. From 1948 to 1954 the authorized rate was 5.6 percent, in 1954 it became 6.25 percent, in 1958 it became 6.75 percent and 1964 it was reduced to 6.3 percent. (Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 643-644, 44 Cal.Rptr. 1, 401 P.2d 353.) In 1968, the rate of return was 6.9 percent.

In the last cited case, we concluded that the rate of return there involved was "within the bounds of reasonableness" and would not be disturbed. (62 Cal.2d at p. 656, 44 Cal.Rptr. 1, 401 P.2d 353.) The return allowed in the instant case was within the range of the commission's staff recommendation, was only slightly above that urged by petitioner cities, and was within the range of reasonableness. The matters considered by the commission in fixing the rate of return were of the same nature as those considered in the last cited case, and we are satisfied that the commission did not abuse its discretion in fixing the rate of return.

LICENSING CONTRACT SERVICES

Pacific's parent, American, provides certain services such as basic research, assistance in engineering, legal, accounting, financing and other matters for the Bell System operating companies, of which Pacific is one, where these services can be performed more efficiently and effectively on a centralized basis. The amount Pacific pays to American for these services is computed by taking an amount equal to 1 percent of Pacific's gross revenue.

Historically, the commission has rejected the amount computed on the percentage-of-revenue basis when determining Pacific's reasonable expenses for the purpose of setting rates.[9] In lieu of the percentage-of-revenue computation, the commission has used for rate setting purposes the actual costs to American for services rendered to Pacific. The licensing contract expense allowed in the instant case was computed in this manner. However, use of the actual cost figures resulted in a higher allowance than the actual payments made to American.

[17] We pointed out earlier in connection with the discussion of the Western Electric adjustment that in the light of the dominance of the Bell System and its integrated position, the utility enterprise must be viewed as a whole without regard to separate corporate entities. In accordance with this fundamental principle, the commission properly decided to use the actual costs of the services rendered by American rather than the amount paid by Pacific to Amerian.

LIFELINE SERVICE

The "lifeline service" is a basic minimium service which was previously offered at the rate of $2.25 per month with a message allowance of 30 units. This rate was the same, irrespective of whether one or two-party service was used. The service is offered in those areas where residential mes-

[9] The percentage-of-revenue basis of payment was rejected because although over a period of years it might result in average charges that were reasonable, the end result in any particular year at a particular level of rates might not be reasonable. For example, a 10 percent increase in Pacific's rates would result in a 10 percent increase in payments to American for exactly the same services.

sage rate service is available, with the only restriction being that no more than one such service is allowable per dwelling unit.

[18] Pacific requested that the basic charge for this service be increased to $2.95 and that the 30-message units allowance be reduced to zero. The commission authorized the increase in basic charge to $2.95, but only allowed the message unit allowance to be reduced to 20. This is said to amount to a 52 percent increase in cost to "lifeline" subscribers.[10]

Neither Pacific nor the commission have cited us to any evidence in the record to support this extraordinary increase in cost of the lifeline service,[11] and our review of the record has failed to disclose any such evidence. The extraordinary increase in cost of the lifeline service cannot be sustained on the record before us.

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[10] Although the increase from $2.25 to $2.95 is 31.1 percent, the *actual cost* should be calculated by not only figuring the increase in the basic rate, but also calculating the *loss in value* of the service, namely the loss of 10 units of the message allowance, or one-third of the lifeline value. On this basis, the actual percentage increase for lifeline users is claimed to be 52 percent.

[11] Pacific cited pages 5575-5577 of the transcript as evidence that the lifeline service requires an initial capital investment of between $25 to $50 per customer. This testimony was in response to the question whether a lifeline system could be established in Sacramento. In cities where such service has already been instituted, the capital investments have already been made and cannot be the basis for requiring an increased rate. No cost statistics were offered by which the commission could determine the reasonableness of the proposed rate increase. In its answer, Pacific asserts that the cost of providing lifeline service greatly exceeds the revenue produced thereby but fails to point to any evidence in the record to sustain this assertion.

Majority, Concurring and Dissenting Opinion in City of Los Angeles v. California Public Utilities Commission

LONG TERM CONSTRUCTION PLANS

The commission ordered Pacific to install $750 million of plant additions for each of the years 1971, 1972, and 1973. The finding supporting this order stated that plant additions of at least $750 million per year by Pacific for the next three years would increase the likelihood of service problems. This finding was based on evidence in the record which included an analysis of Pacific's 1970 construction expenditures and estimates, as to both size and necessity, and of the construction expenditures anticipated for the next few years. One of the exhibits described in detail the manner in which Pacific arrived at its estimates of future construction expenditures. The commission staff also made their own estimates which closely matched those of Pacific.

Under section 761 of the Public Utilities Code, the commission is authorized after a hearing and a finding that the ". . . practices equipment, appliances, facilities, or service of any public utility . . . are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, . . ." to order ". . . practices, equipment, appliances, facilities, [or] service, . . ." to be used by the regulated utility. Section 762 of the Public Utilities Code authorizes the commission to order changes after a hearing and finding that ". . . additions, extensions, repairs, or improvements to, or changes in, the existing plant . . . or other physical property of any public utility . . . ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of . . . the public, or in any other way *to secure adequate service or facilities,* . . ." (Italics added.)

[19, 20] It is contended that the instant order was outside the authority of either section 761 or 762 because the sections do not specifically authorize the commission to make a general order to expend a gross dollar amount, rather than ordering construction of a particular facility. The intent of these sections is to allow the commission to insure that the utility can and will provide adequate service. Such a broad intent can support a general order as was issued in the instant case.

Moreover, Pacific concedes that the commission has the power to review the specific expenditures made from this gross amount and to disallow as an expense any which it considered unjustified or wasteful. Such review alone satisfies petitioners' objection to the order.

[21] It is also contended that the order is based on an insufficient finding. The commission's finding that the addition of $750 million per year would decrease the likelihood of service problems is sufficiently specific to satisfy the requirements of section 1705 of the Public Utilities Code.

[22] In addition it is urged that the commission ignored important opposition testimony by a certain witness. The commission did not ignore this testimony. On the contrary, the opinion explained in detail the commission's reasons for rejecting the testimony. When conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final. (Southern Pac. Co. v. Public Utilities Com., 41 Cal.2d 354, 362, 260 P.2d 70.)

ADVERTISING EXPENSES

The commission allowed Pacific to include $11.5 million spent on advertising as an operating expense. The actual

advertising expenditures attributable to California were approximately 12.9 million. The commission disallowed $1.4 million on the recommendation of its staff on the ground that there was serious doubt as to whether all the actual advertising expense related to "informative" as opposed to "institutional" advertising.

[23] It is contended that since Pacific is a monopoly with captive consumers, any advertising except that of informing the public of emergency services is calculated to and does no more than create a good public image, and as such is institutional advertising which is not allowable as an operating expense. Advertising which is properly classified as informative results in more than a mere fostering of goodwill. It should result in reductions in operating costs and more efficient service to the ratepayer. The commission could properly conclude that expenditures for such purposes are reasonable operating expenses, and in the absence of a showing that the amount allowed for informative advertising was primarly directed for other purposes, the allowance of the commission must be upheld.

MISCELLANEOUS CHARGES

After individual consideration of the majority of items affecting the rate proposal, the commission dealt with those which remained under the heading of "Other Miscellaneous Charges." Most of the items in this category involved rate and installation charges for numerous equipment and service functions. All of the items are identified in exhibit 11, section 3, which explains that each such charge is supported by recent cost studies. These cost studies were provided to the commission staff for review and one such study was introduced as evidence.

The Commission determined that the rate changes requested merely recognized the ". . . rising costs of the offerings, . . ." and that since most of the proposed rates involved less than a 25 percent increase, they should be approved.[12] In its findings and conclusions, the commission stated, "[b]ased upon the record herein, the increases in rates and charges authorized herein are justified; the rates and charges authorized herein are reasonable; and the present rates and charges, insofar as they differ from those prescribed herein, are for the future unjust and unreasonable."

[24] It is contended that the commission's finding that these increases were justified and reasonable is inadequate. The finding on which these increases were based not only enumerated the commission's reasons for allowing the increase, but was supported by substantial evidence which was before the commission. The contention is therefore without merit.

MOTION TO QUASH SERVICE

On March 2, 1971, petitioner Bennett was issued three subpoenas to compel the attendance of Pacific's president and two other corporate officers at public hearings involving telephone rate increases. The return date on the subpoenas was March 17, 1971, at 9:30 a. m. The subpoenas were left with an employee of Pacific, who was designated to accept service of process on the corporation, on March 16, 1971.

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[12] Of the rates included in the miscellaneous list, 72 percent involved increases of 25 percent or less. The other 28 percent (four items) involved increases ranging from 260 percent to 960 percent.

The commission held that the subpoenas had not been properly served and ordered them quashed, thus denying petitioners an opportunity to examine the corporate officials. Petitioner Bennett argues that such a holding constitutes a denial of due process of law.

[25] Section 1987 of the Code of Civil Procedure provides that except in the case of a peace officer: "(a) . . . the service of a subpoena is made by delivering a copy . . . to the witness *personally* . . . [or][¶] (b) In the case . . . of a party . . . or of anyone who is an officer, director, or managing agent of any such party . . . the service of a subpoena upon any such witness is not required if written notice requesting such witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of such party or person. Such notice shall be *served at least 10 days before the time required for attendance* unless the court prescribes a shorter time." (Italics added.)

Petitioner Bennett delayed serving the subpoenas for 14 days until the eve of the return date, and the commission did not abuse its discretion in quashing the subpoenas on the grounds that they had not been properly served.

PROPRIETY OF COMMISSION MEETING

[26] Following the issuance by the Public Utilities Commission of the instant decision on June 22, 1971, petitioner Bennett requested a rehearing. This initial petition for rehearing was denied on June 29, 1971, and an amended petition for rehearing was filed on July 2, 1971. The amended petition, under provisions of the law, stayed the effective date of the rate increase. On Sunday, July 4, 1971,

three of the commissioners came together at an airport near Concord, California, and denied the amended petition. Petitioner Bennett contends that such a meeting was in excess of the commission's jurisdiction.

Section 306 of the Public Utilities Code directs the commission to ". . . meet at such . . . times and in such . . . place as may be expedient and necessary for the proper performance of its duties, . . ." Petitioner has not asserted that Concord, California, was not an expedient meeting place, nor that July 4, 1971, was not a necessary time. Petitioner's innuendos of misconduct, absent specific allegations, are an insufficient basis for review of the meeting's propriety.

ANNULMENT OF THE COMMISSION'S ORDER

[27, 28] As we have seen, the portions of the commission's decision dealing with the federal and state tax expense, the Western Electric adjustment, and the new "nonrevenue producing" capital expenditures cannot be sustained on the record before us. Although the exact amount of money involved in these portions of the decision is not clear from the record, it is clear from the record that the amount is substantial in relation to the $143 million annual rate increase, and it is possible that the amount involved in the enumerated items is equal to or exceeds the amount of the increase.[13] No basis appears to sever these

[13] With respect to the federal and state taxes, the Western Electric adjustment, and the so-called nonrevenue capital expenditures, the relevant figures in the instant case relating to the effect of the departure from accounting principles used in the 1968 rate proceeding are unclear and in some respects conflicting. Nevertheless, some of those figures which seem reliable indicate that more than half of the $143 million increase in the revenue requirement is

matters from the increase of rates ordered by the commission, and it is not claimed that severance is possible. Pacific urges that the increased rates should be continued in effect until the commission establishes a new rate, but there is no basis to continue a rate once it is determined that the rate is invalid. We conclude that the commission's order increasing rates must be annulled in its entirety. This would ordinarily mean that the prior lawfully adopted rate would then go into effect.

On April 4, 1972, the commission by Decision No. 79873 authorized new telephone rates which provided for an increase in rates totalling approximately $70 million annually. This increase includes in it the $143 million increase before us. The April 4 increase was not based on a full scale rate proceeding; rather the commission used the figures and results used in the proceeding before us, using the same test year, and merely adjusted to offset higher operating expenses due to changes in the wages paid, tax law changes, and changes in some other items. On the basis of these changes the commission granted the increase in rates so that the anticipated revenues would produce the

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attributable to the accounting changes which cannot be sustained on the record before us. There is also a strong indication that more than $143 million is accounted for when the amount of revenue increase necessitated by these accounting changes is added to the amount of revenue increase attributable to the change in the rate of return, which in a sense is also an accounting adjustment. In other words, there is reason to believe, although it is not entirely clear, that there has been no substantial changes in the relationship between revenue and expenses since the 1968 rate proceedings involving Pacific, and that none of the rate increase was necessitated by changes in the actual revenue and expenses of Pacific, but that the entire increase may be attributable to the change in the accounting principles and evaluations applied by the commission in determining rates.

rate of return found reasonable in the instant proceeding. The decision of April 4 is not before us, and although the rates fixed in that proceeding are obviously based in part upon the erroneous determinations in the proceeding before us, we cannot annul in this proceeding the April 4 decision.

Nevertheless, we must recognize that the April 4 rates will supersede the rates in the decision before us, that the errors in the instant proceedings would require annulment of the April 4 decision should it come before us on review unless appropriate action is taken, and that unless this court acts to effectuate our decision the errors we have found will merely be carried forward into future rate increases.

We conclude that to avoid this result this court should order the commission to reinstate the rates of its last lawful order preceding the instant rate proceeding, provided, however, that it may grant interim rate increases upon appropriate findings (see Saunby v. Railroad Commission, 191 Cal. 226, 230 et seq., 215 P. 904; Decision No. 42530, 48 Cal.P.U.C. 487, 488; cf. Dyke Water Co. v. Public Utilities Com., 56 Cal.2d 105, 110, 14 Cal.Rptr. 310, 363 P.2d 326), while it considers the propriety of the application for rate increase before us. Such a provision will permit the commission to grant immediate relief to Pacific if appropriate and should prevent the invalid determinations of the commission in the instant proceedings from continuing to affect future rates.

REFUNDS

At the request of petitioners and with the consent of Pacific, we have previously issued a partial stay providing

that all sums collected by Pacific pursuant to the rates authorized by the decision under review shall be subject to refund in whole or in part upon order of this court should the decision or Decision No. 77984 of the commission be annulled or modified.

Petitioners claim that upon annulment of the decision before us the rate increase will be determined to be invalid, that all sums collected in excess of the last lawful rate will have been illegally collected, and that all such sums must be refunded. Pacific urges that this court defer determination of refunds. Pacific's position is that the case should be remanded to the commission to set a new lawful rate in the light of our opinion, and that the refunds should be limited to the difference, if any, between the rates set in the decision before us and the rates set in the further proceedings. Pacific's argument was made in a brief filed before the April 4 decision and it should be pointed out that in the circumstances of this case the rates contemplated by Pacific to be set in further proceedings to determine the amount of refund are artificial rates, and will never go into effect except for the purpose of determining refunds because new rates to be established by the commission for the future will no doubt take into account the matters which led to the April 4 increase in rates. It would obviously be inappropriate to consider such matters in determining the amount of refund in the instant case.

The statutes dealing with stay of commission rate changes pending review by this court do not expressly deal with the question of refunds where there has been a stay and rate increase is subsequently annulled. The statutes authorizing stays, sections 1762-1764 of the Public Utilities Code, merely provide for the stays and the posting of bonds

or the impounding of funds without dealing with the situation before us. In other situations, the Legislature has more clearly spelled out the rights of the parties. Thus, where a commission order *reducing* rates is stayed, or where a commission order denying a rate increase is stayed, and the utility is permitted to charge the proposed higher rates pending review, the statute provides expressly for refunds if the commission order is ultimately affirmed. (Pub.Util. Code, §§ 1764, 1766; cf. Market St. Ry. Co. v. Railroad Commission, 28 Cal.2d 363, 368, 171 P.2d 875). The absence of any provision for refunds should a commission order be annulled for any reason apparently establishes that no refund will be permitted for annulment of a rate decrease irrespective of the reasons for annulment. The latter situation, the annulment of a rate *decrease,* is of course the converse of the situation before us, the annulment of a rate *increase,* and this suggests that full refunds are in order where a rate increase is annulled.

We are confronted with a similar question in Pacific Tel. & Tel. Co. v. Public Util. Com., *supra,* 62 Cal.2d 634, 649-656, 44 Cal.Rptr. 1, 401 P.2d 353. In that case the commission determined that Pacific should reduce its rates by more than $40 million annually. The commission also ordered that Pacific refund to its customers amounts collected from its customers in excess of the new rates during the nearly two years while the rate investigation had been pending before the commission. The amount of the refund ordered was approximately $80 million. Although we affirmed the decision of the commission insofar as it reduced future rates, we annulled the portion of the decision which required the refund. We concluded after an extended review of the relevant statutes that the Legislature had given

the commission power to establish rates prospectively and has not given it power to order refunds of amounts collected by a public utility pursuant to an approved order which has become final.

[29] We pointed out that the fixing of a rate is prospective in its application and legislative in its character, that under section 728 of the Public Utilities Code, as well as other sections of the code, the commission is given power to prescribe rates prospectively only, and that the commission could not, even on grounds of unreasonableness, require refunds of charges fixed by formal finding which had become final. (62 Cal.2d at pp. 650-655, 44 Cal.Rptr. 1, 401 P.2d 353.) We recognized that there may be policy arguments for giving power to the commission to order refunds retroactively where rates are found to be unreasonable or to prevent unjust enrichment, but we concluded that such "arguments should be addressed to the Legislature, from whence the commission's authority derives, rather than to this court." (62 Cal.2d at p. 655, 44 Cal.Rptr. at p. 14, 401 P.2d at p. 366.) The Legislature has not changed any of the relevant statutory provisions.

We pointed out that the conclusion that the Legislature has not authorized retroactive rate making was supported by section 734 of the Public Utilities Code. (62 Cal.2d at pp. 654-655, 44 Cal.Rptr. 1, 401 P.2d 353.) That section provides that when a rate has been formally found reasonable by the commission, the commission shall not order the payment of reparation upon the ground of unreasonableness. Of course, the rates existing prior to the present proceeding have been found reasonable by a final commission decision.

[30] When the rates set in the decision before us are annulled, the only lawful rates are those which were in existence prior to the instant decision. We are satisfied that to permit the commission to fix new rates for the purpose of refunds, as requested by Pacific, would involve retroactive rate making in violation of the principles recognized in Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 649-656, 44 Cal.Rptr. 1, 401 P.2d 353. The basic conclusion that the rates existing prior to this proceeding are unreasonable as well as the conclusion that increases in rates are justified are both based on the same defective findings. To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively. As we have seen, the Legislature has expressly prohibited the granting of reparations on the basis of unreasonableness, where, as here, there is an approved rate, and the Legislature has authorized only prospective rate making.

Although there may be substantial policy reasons to permit retroactive rate making, there are also substantial reasons to the contrary, and it is for the Legislature to determine whether California should abandon its policy against retroactive rate making.

The adoption of a comprehensive scheme of public utility rate regulation involves numerous considerations, and it has been recognized that absolute equity must sometimes give way to the greater overall good, including the demands of certainty and efficiency. (See Keco Industries v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465, 469.) The Ohio Supreme Court in *Keco* rejected

the view urged by Pacific that the refunds should be the difference between the invalid rate and the future rates ultimately adopted by the regulatory agency. It pointed out that, although there may not be absolute equity in every circumstance, the Legislature has attempted to keep the equities between consumer and utility in balance and that departures from the absolute equity position based on policy considerations could work in favor of either. This seems reflected by the recent history of the telephone rates in our state. In Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 649-656, 44 Cal.Rptr. 1, 401 P.2d 353, we held that the commission, in the light of the rule against retroactive rate making, could not compel Pacific to refund $80 million although we did not dispute the commission's findings that a sum of that magnitude was collected in excess of what would have been a reasonable rate. Today, in furtherance of the same rule, we must compel Pacific to refund a similar or perhaps larger amount.

In the light of the rule against retroactive rate making, it cannot be said on the record before us that inequity will result from a refund of the entire increase of rates collected pursuant to the invalid order. The record does not demonstrate that the increased rates are necessitated by changes since the 1968 rate proceeding in the relationship of revenue and expense of the utility. To the contrary, there is a strong indication that the entire rate increase is due to changes in accounting principles and accounting evaluations made by the commission. (See fn. 13.) Under the rule against retroactive rate making changes in the rates due to changes in accounting practices and accounting evaluations should only be given effect prospectively after such changes are made on a proper record. As pointed

out in Pacific Tel. & Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 656, 44 Cal.Rptr. 1, 14, 401 P.2d 353, 366, it "is the 'just, reasonable, or sufficient *rates*' (italics added) which section 728 directs the commission to fix after it first finds that 'the rates charged, or collected . . . are unreasonable'." The accounting changes in the instant case are essential to the finding of unreasonableness.

The cases of United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211, and Atlantic Coast Line v. Florida, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451, relied upon by Pacific, are distinguishable. In those cases, the earlier rate which was to be superseded by the administrative agency's invalid rate change was not fixed by the agency and found to be reasonable after hearings as was done in the case before us. We recognized that prior approval of the administrative agency might be a decisive consideration in Pacific Tel. &. Tel. Co. v. Public Util. Com., *supra*, 62 Cal.2d 634, 653, 44 Cal.Rptr. 1, 401 P.2d 353, where we distinguished a case on this basis. Moreover, *Morgan* and *Atlantic Coast Line* are of doubtful validity in the light of the later decision in Chicago, M., St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 302, fn. 2, 78 S.Ct. 304, 2 L.Ed.2d 292, wherein the district court had required that funds due to the rate increase be impounded and paid to the ratepayers in the event the administrative order was annulled. Although the United States Supreme Court merely noted and did not discuss the validity of the refund order in its opinion upholding the annulment of the rate increase, the question seems to have been squarely presented on a subsequent application for supersedeas. The court then denied the application without opinion, but a five-page dissenting opinion was filed urging the court to follow *Morgan* and *Atlantic*

Coast Line. (356 U.S. at pp. 906-910, 78 S.Ct. 665, 2 L.Ed.2d 573.) [14]

We conclude that the entire increase of rates collected pursuant to the invalid order must be refunded. We are informed that the rates approved in the April 4 decision, as amended, went into effect on May 27, 1972. As we have seen, the April 4 increase of rates includes the invalid increase before us, and the latest increase was not based on a full-scale rate proceeding but rather merely adjusted the rates before us to offset certain changes in operating expenses. Insofar as the rates which went into effect on May 27 reflect increases based on the invalid order before us, refunds are necessary. However, insofar as the May 27 rates are attributable to the approximately $70 million increase authorized on April 4, they are not subject to refund at this time.

The decision is annulled. The commission is directed to reinstate the rates of its last lawful order preceding the instant rate proceeding provided, however, that it may grant interim rate increases should it find them appropriate while it reconsiders Pacific's application for rate increases.

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[14] In Thermoid Western Co. v. Union Pacific Railroad Co., 12 Utah 2d 256, 365 P.2d 65, like the *Morgan, Atlantic Coast Line,* and *Chicago* cases, the earlier rate which was to be superseded by the invalid rate change was not fixed by the agency after hearings, and thus the case is distinguishable. Moreover, the majority in following *Morgan* and *Atlantic Coast Line* stated that, had the funds from the invalid rate increase been impounded, a different result might have been reached. (365 P.2d at p. 70.) Of course, in the instant case our partial stay was, in effect, an order requiring the increase in rates to be impounded.

The other three state cases cited by Pacific deal with the problem of refunds without any substantial discussion of the problem, and none of the cases cited by Pacific consider in this connection the policy against retroactive rate making.

The commission is further directed to order Pacific to make refunds in accordance with the views expressed herein.

WRIGHT, C. J., and McCOMB, TOBRINER, BURKE, and SCHAUER,* JJ., concur.

CONCURRING AND DISSENTING OPINION BY MOSK, J.

MOSK, Justice (concurring and dissenting).

I concur with the majority opinion except for its approval of the commission's authorization for Pacific to include $11.5 million spent on advertising as an operating expense.

By way of introduction I point out that several years ago Pacific attempted to include in operating expenses all the dues it paid to chambers of commerce and the contributions it made to charities. In decision No. 67369 the commission disallowed over half of that amount, observing that "Dues, donations and contributions, if included as an expense for rate-making purposes, become an involuntary levy on ratepayers, who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy." The commission then ruled that *all* such expenses would be disallowed in the future, and we held this to be "the correct rule." (Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 Cal.2d 634, 668-669, 44 Cal.Rptr. 1, 22, 401 P.2d 353, 374; see also *id.* at pp. 676-677, 44 Cal.Rptr. at p. 22, 401 P.2d at p. 374 (concurring opn. of Mosk, J.).)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

By the same token I believe that in the present proceeding the commission should have eliminated all of Pacific's claimed advertising costs in its calculation of operating expenses for rate-making purposes. Advertising is generally designed to create goodwill. I submit that the cost of promoting company goodwill should come out of the pockets of stockholders rather than ratepayers. My conclusion in 1965 regarding voluntary contributions applies equally well here: "A dissatisfied stockholder may seek to change the policies of a corporation, defeat the directors, or sell his stock investment. No comparable alternatives are available to a monopoly ratepayer, whose only choice is to pay the full bill sent to him—for services rendered and gifts made in the name of the company—or abandon the use of his telephone." (Pacific Tel. & Tel. Co. v. Public Util. Com., supra, at p. 677, 44 Cal.Rptr. at p. 27, 401 P.2d at p. 379 (concurring opn.).)

The advertising of the utility falls into two categories. The first, service informative advertising, according to testimony before the commission, is designed "to inform, advise, instruct and solicit the cooperation of telephone users in making the most efficient use of the telephone. Subjects covered include: direct distance dialing and area codes; directory assistance calls; use and posting of emergency numbers; correction of billing; promotion of goodwill through 'we're here to help' campaign; advice on how to handle malicious, obscene or harassing calls; repair service; buried cable; open house and public service."

Public instruction which is deemed necessary to proper use of telephone facilities can adequately be provided in the informational pages of the annual telephone directory. By definition, the item for "promotion of goodwill through

'we're here to help' campaign" is calculated merely to foster goodwill. And advice on how to handle obscene telephone calls is properly a function of law enforcement agencies. Thus I would eliminate all the costs attributable to the first category.

The second category, service promotional advertising, according to testimony before the commission, is designed "to stimulate the use of revenue-producing attachments, extensions, etc., or to stimulate long distance calling." This type of advertising is also suspect.

I find it incongruous that the utility should be encouraged to expend sums for advertising to stimulate the public to make telephone calls at the very time it is seeking substantial funds for new equipment because of the overtaxing of present facilities. Nor can I justify promotion of sales of attachments, extensions and similar devices, many of which are more decorative than functional, as an essential item of operating expense chargeable to ratepayers. Such cost should be added to the charge for the device itself, but not constitute a levy upon ratepayers generally.

In the abstract sense, of course, the judiciary is not well placed to reexamine each and every item of accounting that has heretofore been considered by the staff and members of the regulatory commission. On the other hand, the staff member who testified on the subject of advertising at the commission hearing conceded that "A review was made of the types of advertising used but *no in-depth study was made as to the cost vs. benefits of such advertising.*" (Italics added.) I would refuse consideration of all advertising expenses for rate-making purposes, at least until such time as an appropriate in-depth analysis has been made.

While $11.5 million may not be a substantial percentage of the total operating expenses of this vast public utility, nevertheless it is not a trivial sum when expended by a corporation which operates as a monopoly bearing the imprimatur of the state. It is obviously a highly visible use of the ratepayers' money, and appears to stir up considerable public resentment. The commission's decision itself recognizes that "The item of Pacific's expenses which was subject to the most criticism of public witnesses is advertising." I can only conclude that the commission should have paid greater heed to the sensitivity of the public it is created to serve.

Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California. And related matters.	Application No. 51774 Case No. 9036 Case No. 9042 Case No. 9043 Case No. 9044 Case No. 9045

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Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

Pursuant to Section 1731 et seq of the Public Utilities Code (Code) and Rule 85 of the Commission's Rules of Procedure, California Independent Telephone Association, in support of this petition, represents as follows:

I

IDENTITY OF PETITIONER AND SCOPE OF THE PETITION.

Petitioner is an unincorporated non-profit trade association with 28 members who are independent public utility telephone companies engaged in furnishing public utility telephone service in the State of California. Included among said members are General Telephone Company of California (General) and Continental Telephone Company of California (Continental). Petitioner is informed that General and Continental are filing separate petitions directed to Decision No. 80346. Consequently, this petition is directed essentially to paragraph 5 of the Findings and paragraph 5 of the Order in Decision No. 80346.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT DIRECT OR REQUIRE ANY REFUNDS BY INDEPENDENT TELEPHONE COMPANIES.

Decision No. 80346 requires Pacific Telephone & Telegraph Company (Pacific) and the independents to refund all toll revenues "collected over and above Pacific's (toll) rate levels * * in effect prior to July 23, 1971, less the rate increments authorized in Decision Nos. 78973 and

Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

79941 * *" In rendering Decision No. 80346 the Commission asserts that it is complying with and implementing the direction of the California Supreme Court in *City of Los Angeles* v. *Public Utilities Commission*, 7 Cal.3d 331. An analysis of that decision demonstrates that it does not contemplate or require any toll revenue refunds by the independent telephone companies.

City of Los Angeles was a proceeding to review Commission Decision No. 78851 wherein Pacific was granted an increase of $143,000,000 in annual revenues. The objective of the petition for writ of review and the clear intent of the Court in that case was to annul *that increase.* At page 49 of the typewritten copy of Decision No. 78851 the Commission set forth the sources of the $143,000,000 increase that was granted to Pacific. This compilation shows a total increase of $21,000,000 in message toll revenue less $6,000,000 in settlements with independents or a net sum of only $15,000,000 increase in toll revenue that was included in the $143,000,000 increase that was authorized by the Commission and was annulled and directed to be refunded by the Supreme Court. Accordingly, at page 359 of the decision in *City of Los Angeles* the Commission was directed to order *"Pacific"* to make refunds to the extent that it had realized the $143,000,000 increase granted by Decision No. 78851. As to message toll revenues, this clearly required refund of only the increased toll revenue realized by Pacific *after settlement with the independents.* The $6,000,000 to be derived by the independents was not involved or mentioned in the Court decision.

The independents were not parties to the review proceedings and to require them to make refunds would

not only violate the manifest intention of the Court but would operate to deprive them of property without due process of law in contravention of both the state and federal constitutions.

III

The Order Requiring Refunds by the Independents is Invalid and in Excess of the Authority of the Commission

Although the message toll rates of the independents are by concurrence in Pacific's rates, they nevertheless constitute authorized rates of the respective independents to the same effect as if each of them had filed a message toll tariff identical with that of Pacific. The message toll rates established by Decision No. 78851 were lawfully charged and collected by the independents. Their rates were not nullified by the Supreme Court decision nor are they subject to refund. (§ 734 of the Code)

In *Pacific Tel & Tel* v. *Public Utilities Commission*, 62 Cal.2d 634, 649-656, it was held unequivocally that the Commission is without authority to reduce rates retroactively and can establish rates only prospectively and after hearing. This principle was reaffirmed in *City of Los Angeles* at pages 356-357.

In the proceeding to review Decision No. 78851 the Supreme Court issued a partial stay providing that "all sums collected by Pacific" pursuant to the rates authorized by the decision under review should be subject to refund in whole or in part upon order of the Court should Decision No. 78851 be annulled or modified. This stay order did

not apply to the independents. Similarly, ordering paragraph number 3 of Decision No. 78851 related only to possible refunds *by Pacific*. In *Pacific Tel & Tel* v. *Public Utilities Commission*, 62 Cal.2d 634, 652, the Court stated:

> "In at least two cases it has been held that a utility whose rates had been commission-approved could not be compelled to make refunds of new and increased rates collected under a commission order set aside on appeal, *where the order had not been stayed.*" (Emphasis added)

To the same effect see United States Supreme Court Decision in *Arizona Grocery Co.* v. *Atchison T.&S.F. Ry.*, 284 U.S. 370.

The refund order in Decision No. 80346, insofar as it pertains to the independents, not only is not justified under the Supreme Court decision but, contrary to the authorities above cited, operates to reduce the authorized message toll rates of the independents retroactively and without any due process hearing. These principles are not applicable to Pacific because of the partial stay order and ordering paragraph 3 of Decision No. 78851.

IV

A Hearing on Message Toll Refunds is Necessary.

In *Pacific Tel & Tel* v. *Public Utilities Commission*, 62 Cal.2d at 675, the Court stated, referring to the independent telephone companies, as follows:

> "They are also fearful that the reduction of Pacific will mean a possible Commission order to reduce their own

rates, before they have been afforded a hearing by the Commission.

"Suffice it to say that the provisions of Sections 1705 and 728 (see also § 766) and the views expressed in this opinion should serve to reassure the independents to the contrary. The Commission is cautioned accordingly."

The independents have been afforded no hearing on the matter of refunds and thus, in addition to its other infirmities, Decision No. 80346 violates their rights under the due process clauses of the state and federal constitutions. Furthermore, in order to evolve a comprehensive plan for refund limited to the excess message toll revenues *derived by Pacific* under Decision No. 78851, it is necessary that a hearing be held in which the independents may participate. It is the position of Petitioner that that entire refund must be absorbed by Pacific. This will involve rather complicated procedures which can be resolved only after a hearing at which all parties interested have an opportunity to be heard.

V

A Stay Order is Justified and Necessary.

If the contentions of petitioner herein are ultimately sustained, and if in the interim the independents have made refunds in accordance with Decision No. 80346, they will have suffered irreparable injury thereby. Consequently, it is reasonable and necessary that Decision No.

80346 be stayed until the contentions raised by this petition and those by General and Continental are finally resolved.

VI

PRAYER.

For all of the reasons above mentioned, Petitioner respectfully requests that the Commission issue its order as follows:

1. Modifying Decision No. 80346 so as to limit the refund of message toll revenues to the net increase realized by Pacific from the rates authorized in Decision No. 78851 after settlement with the independents and providing that such refund be entirely absorbed by Pacific.

2. In the alternative granting a rehearing of Decision No. 80346 in order to determine a plan and procedures for the refund mentioned in paragraph 1 above.

3. Staying Decision No. 80346 pending the modification and/or rehearing above requested.

Dated at San Francisco, California, this 17th day of August, 1972.

Respectfully submitted,

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Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

CERTIFICATE OF SERVICE BY MAIL

CLAUDE N. ROSENBERG certifies as follows:

He is an active member of the State Bar of California and is not a party to the within cause;

His business address is 3300 Bank of America Center, 555 California Street, San Francisco, California 94104;

On August 17, 1972, true copies of the attached Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346 were placed in envelopes addressed to:

See list attached

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mail box regularly maintained by the United States Government in the City and County of San Francisco, State of California.

/s/ CLAUDE N. ROSENBERG
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Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

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Petition of California Independent Telephone Association for Modification, Rehearing and Stay of Decision No. 80346

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Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California. And related matters.	Application No. 51774 Case No. 9036 Case No. 9042 Case No. 9043 Case No. 9044 Case No. 9045
In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California in an amount necessary to offset increases in wage and salary rates.	Application No. 52794

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San Francisco, California
August 17, 1972

Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

COMES Now, Continental Telephone Company of California (referred to herein as "Continental"), party in the above-entitled matter, and represents as follows:

I

POSITION OF CONTINENTAL

In these proceedings (consolidated by direction of the Commission on August 1, 1972 by Decision No. 80349), Continental filed two motions: the first on July 31, 1972 relating to refunds of toll revenues and the second on August 1, 1972 relating to the separate determination of statewide message toll telephone rates. While the Commission has not ruled on either of these motions directly, it has in effect denied the motion with respect to the refund of toll revenues by issuing Decision No. 80346 ordering Continental and other independent telephone companies to make refunds of toll revenues in accordance with refund plans attached to that decision. In so doing, the Commission has acted without any lawful authority and has entered an order which will have the effect of taking Continental's property without due process of law in violation of the State and Federal Constitutions. Accordingly, Continental respectfully petitions the Commission for a rehearing or modification of Decision No. 80346 insofar as such decision orders refunds of toll revenues collected under Decision No. 78851.

In addition, while the Commission considers this Petition with respect to Decision No. 80346, Continental respectfully requests that the order set forth therein insofar as it directs toll rate refunds by The Pacific Telephone and

Telegraph Company ("Pacific") and the independent companies be stayed until final action by the Commission and review by the California Supreme Court, if required. If such a stay is not entered and if, as Continental urges, the amount of toll refunds are ultimately reduced, Continental and all other independent companies will have suffered irreparable harm if the total refund has already been made.

II

Decision No. 80346 is Erroneous in that it Fails to Specifically Rule with Respect to Continental's Motion

At the conclusion of hearings on August 4, 1972, the Examiner stated with respect to Continental's motion concerning toll refunds (Transcript vol. 84, p. 9231):

> "As far as refunds based on toll rates, I think the refund plan that has been proposed by the staff is as accurate and as adequate as we are going to get it."

He indicated further that he would recommend denial of the motion by the Commission (Transcript vol. 84, p. 9231, 11, 12-13). The Commission, however, has yet to formally rule on the merits of the motion made by Continental. More importantly, the Commission erroneously has failed to make findings of fact and conclusions of law with respect to the issues raised by the motion.

Section 1705 of the Public Utilities Code requires that every decision of the Commission "shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision." This statutory provision has been liberally construed

by the California Supreme Court. "It has been repeatedly emphasized that separate findings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.' [Citations.]" (*City of Los Angeles* v. *Public Utilities Com.*, 7 Cal.3d 331, 337 (1972).)

Continental's motion raised "issues material to the order or decision" and consequently require specific findings of fact or conclusions of law thereon.

Continental's motion was by way of letter to the Commission filed on July 31, 1972 and taken as a motion by the Examiner (Transcript vol. 84, p. 9117, ll. 27-30). This motion interposed Continental's objection first to any order of the Commission directing Continental to make toll refunds and, secondly, to requiring refunds in any event without having first conducted a hearing with respect to such refunds. The materiality of the refund of $6 million of independent company toll revenues is obvious. After recognizing the Supreme Court mandate that *Pacific* make refunds, but without any further analysis, the Commission stated that: "[B]ecause Pacific shares its message toll rate revenue with 28 independent telephone companies in California, and its message unit revenue with General Telephone, all such independent companies should also be required to make refunds accordingly." (Decision No. 80346, Mimeo. pp. 4-5.) There are no findings of fact, however, from which Continental, or the Supreme Court

on further review, can possibly determine the basis of the decision that independent companies must refund as well as Pacific.

Moreover, the Commission neither held hearings nor heard any evidence or argument on important issues raised by Continental as to the effect of the refund of toll revenues on independent telephone companies. Continental called to the attention of the Commission the fact that the record in these proceedings contains no evidence whatsoever as to the manner in which for toll settlement purposes Pacific intends to account for the refunds which it has been directed to make. This is a matter which directly and vitally affects the customers of Continental and the other independent telephone companies. Continental also pointed out that the toll rates which were authorized by Decision No. 78851 included certain toll rate decreases. The refund plan which the Commission has directed Pacific to follow makes no statement whatsoever as to Pacific's intentions with respect to the rebilling of the higher toll rates for station-paid calls during night-time hours which had been in effect prior to Decision No. 78851. There was no evidence taken as to the amount of additional toll revenues which Pacific and the independent companies would have earned during the past year if such higher rates had remained in effect. There are no findings of fact on these issues or any conclusions of law with respect thereto. Indeed, the decision of the Commission, obviously written before Continental had been given an opportunity to raise these issues, simply disregards them.

III

Refunds by Pacific and the Independent Telephone Companies of Message Telephone Toll Revenues Should be Reduced Pro Rata by the Amount of Such Revenues Derived by the Independent Telephone Companies

As Decision No. 80346 now stands, Pacific and the independent companies will be required to refund all toll revenues "collected over and above Pacific's [toll] rate levels . . . in effect prior to July 23, 1971, less the rate increments authorized in Decision Nos. 78973 and 79941 . . ." (Decision No. 78851, Mimeo, pp. 6-7.) Referring specifically to Decision No. 78851, this means the Commission is requiring the refund of the anticipated $6 million of independent company toll revenues authorized. (Decision No. 78851, Mimeo, p. 49.) This constitutes a taking of Continental's property without due process of law in violation of the State and Federal Constitutions.

The refund of toll revenues by independent companies is neither required nor authorized by the decision of the California Supreme Court in *City of Los Angeles* v. *Public Utilities Com.*, 7 Cal.3d 331 (1972). In that decision, the court specifically discussed *only* the $143 million revenue increase for Pacific, it found fault only with that revenue requirement, and it specified refunds *only* for Pacific. "The Commission is further directed to order Pacific to make refunds in accordance with the views expressed herein." (7 Cal.3d, 359.) No mention was made of independent telephone companies. Even the Commission itself in its letter to independent telephone companies with respect to possible refunds has mentioned *only* the $143 million increase in Decision No. 78851.

Since it is only Pacific's revenue requirement that the California Supreme Court found improperly calculated, the only refunds which can lawfully be ordered are the excess revenues derived by Pacific under Decision No. 78851. There has never been any indication by any party to these proceedings, by the Commission or by the Supreme Court, that, with respect to Decision No. 78851, the anticipated $6 million of additional toll revenues provided for independent companies were not required lawful revenues for independent companies participating in the statewide toll pool. Indeed, Continental has relied upon such increased settlements in assessing the timing and the magnitude of its own application for rate relief (Application No. 52859, presently pending). Were it not for such increased settlements, validly authorized by this Commission, Continental long ago would have been compelled to request the Commission to authorize immediate interim emergency rate relief since it has been because of improved toll earnings that Continental (and no doubt other independent telephone companies) has been able to avoid severe financial crisis. Indeed, General Telephone Company of California, subsequent to Decision No. 78851, has had its own rates determined on the basis of the revenues allowed to it in Decision No. 78851.

Under the decision of the California Supreme Court, the total statewide refund of toll revenues must be reduced by that amount of the rate increase authorized by Decision No. 78851 which has flowed to independent companies through settlements. In this way, only the revenues accruing to Pacific under Decision No. 78851 will be refunded, and prior settlements among independent telephone companies and Pacific would not be disturbed because of such

refunds. If we assume that the increased earnings levels anticipated by Decision No. 78851 were met exactly, then toll refunds by Pacific will be $15 million, not $21 million.

In *Southern Bell Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Com'n*, 134 So.2d 61 (1961), the Commission and the Court were confronted with a situation analogous to the present case. The Commission had ordered refunds of 20% of Southern Bell's charges for intrastate toll for a stated period of time. In subsequent proceedings it was made clear by the Commission and affirmed by the Court, that, with respect to interchanged traffic, the refund would be comprised only of 20% of Southern Bell's revenues, even though the refund was made to the customers of all connecting companies. The revenues received by the independent companies through settlements were not refunded.

IV

To the Extent that Decision No. 80346 Requires Continental and the Other Independent Telephone Companies to Make Refunds of Revenues such Companies Received in Settlements with Pacific, it is Erroneous for Failure to have been Determined after Appropriate Hearing

Regardless of the Commission's ultimate decision with respect to refunds to be made by California independent companies and the effect of such refunds on settlements with Pacific, there can be no question that refund orders directed to independent telephone companies cannot be entered until after all the facts have been developed on the record at a hearing to which all parties affected have

an opportunity to present evidence and argument. This was the procedure specified by the California Supreme Court in the last proceeding in which Pacific was required to make refunds. (*Pacific Tel. & Tel. Co.* v. *Public Util. Com.*, 62 Cal. 2d 634 (1965).) In that case, the independent companies, through the California Independent Association, express their concern "that the reduction in the rates of Pacific will mean a possible commission order to reduce their own rates, before they have been afforded a hearing by the commission." In response the Court stated: "Suffice it to say that the provisions of sections 1705 and 728 (see also § 766) and the views expressed in this opinion should serve to reassure the independents to the contrary. The commission is cautioned accordingly." (62 Cal.2d, 675.) Thereafter, this Commission held hearings with respect to refunds. (64 C.P.U.C. 503 (1965) and 65 C.P.U.C. 206 (1966).)

In the instant proceedings, hearings with respect to the refund order are clearly required, certainly at the very least with respect to refunds to be made by the independent companies. As was pointed out by counsel for Continental at oral argument of its motions on August 4, 1972, there is presently no evidence before this Commission regarding the manner in which Pacific will account for refunds or how such refunds may be reflected in toll settlements with the independent companies. In addition, neither the refund plans on file with the Commission nor any other evidence in this record shed any light on what, if any, adjustments might be made in customer billings with respect to toll rates which were *reduced* by Decision No. 78851 from levels existing prior to July 23, 1971.

The foregoing specific issues as well as the basic issue as to the effect of the Supreme Court's annullment of Decision No. 78851 on the independent companies toll revenues, we submit clearly require hearings, particularly in the light of the Supreme Court's statements in the 1965 Pacific proceedings noted above.

V

The Commission's Action Violates the Due Process Requirements of the State and Federal Constitutions

After the June 9 decision of the California Supreme Court annulling Decision No. 78851, Continental was requested by the Commission to prepare and furnish a proposed refund plan. Continental complied with this request but in transmitting its proposed refund plan specifically stated that it did not believe that it was required to make refunds under the Court decision and that it would present this matter to the Court if necessary. The refund plan prepared by Continental and in effect submitted under protest is the plan which has now been ordered by the Commission without taking any evidence or conducting any hearings whatsoever.

Fearing just such hasty action by the Commission, Continental had on July 31, 1972 written to the Commission reaffirming its position that refunds of toll revenues collected by the independent companies under Decision No. 78851 were not required by the June 9 decision of the California Supreme Court and requesting hearings on this issue. The Commission, as we have pointed out, not only

held no hearings but made no findings on the issues raised by Continental.

Under these circumstances, the decision of the Commission directing Continental to refund revenues theretofore lawfully collected by it violates the most basic requirements of due process of law and fair play imposed by the Constitutions of the United States of America and the State of California. It is not necessary, we submit, to belabor the point. In this instance Continental, fearing that the Commission might act hastily and without due consideration of all the factors involved in its decision, had taken the precaution of urging the Commission at the earliest practicable date to delay issuance of a decision ordering refunds of toll revenues until all of the facts could be developed. It now appears to Continental that the decision ordering such refunds may have been prepared before Continental had even been given an opportunity to request that hearings be held. This is not, we submit, the due process of law which is required by long-established constitutional principles. (*Ohio Bell Telephone Co.* v. *Publ. Util. Com'n.*, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093 (1936); *Sale* v. *Railroad Commission*, 15 Cal.2d 612, 617-619 (1940); in general see cases cited in Davis, *Administrative Law Treatise* §§ 7.01, 7.04 (1958 and 1970 Supp.).)

It is particularly galling to Continental that the serious financial problems presented by the Commission's abrupt and unwarranted action arise primarily because of the annullment by the Supreme Court of the Commission's Decision No. 77987 authorizing Pacific to use the so-called "normalization" method of accounting for the tax savings arising from the use of liberalized depreciation in computing federal income taxes. The Supreme Court decision of

June 9, 1972 makes it abundantly clear that the total annullment of Decision No. 78851, at least insofar as the rates of Pacific are concerned (and we remain of the view that the Court was not even aware that such decision might also affect the rates and revenues of the independent companies) arose primarily if not entirely from the fact that Decision No. 78851 was based upon Decision No. 77987. The Court's decision of June 9, 1972 flatly stated (7 Cal.3d 331, 337) that since Decision No. 77987 had been annulled, Decision No. 78851 had to be annulled. In other words, Decision No. 78851 had to be cancelled, not modified, because it was based upon the prior unlawful decision with respect to Pacific's method of accounting for federal tax expense.

Continental, as the record in these proceedings indicates and as the Commission is well aware, has used for many years the so-called "flow-through" method of accounting for the tax savings arising from the use of liberalized depreciation in the computation of tax expense. Continental is an innocent bystander in the lengthy legal dispute over the normalization method of accounting which has now apparently been resolved for California ratemaking purposes by the California Supreme Court. It is clearly unjust and inequitable that Continental should be threatened with the loss of urgently-required revenues, already lawfully collected by it, primarily because the California Supreme Court has held that the normalization method of accounting may not be used by the Commission in fixing Pacific's rates. Indeed this result is so arbitrary and capricious as to raise serious constitutional problems in addition to and apart from the fact that the Commission's action was taken without hearing.

VI

Conclusion

For the reasons set forth herein, Continental respectfully requests that this Commission issue its order as follows:

(a) Modifying Decision No. 80346 so as to exclude from refund that portion of message toll revenue increases which the independent telephone companies derived under Decision No. 78851 and not charge statewide toll settlements with Pacific's portion of the refund;

(b) In the alternative, granting a rehearing of Decision No. 80346 for the purpose of determining the procedures for accomplishing the toll refund; and

(c) Staying Decision No. 80346 pending modification or rehearing as requested above.

Dated at San Francisco, California, this 17th day of August, 1972.

Respectfully submitted,

Orrick, Herrington, Rowley & Sutcliffe

By Robert J. Gloistein
James F. Crafts, Jr.
Robert J. Gloistein
405 Montgomery Street
San Francisco, California 94104

Attorneys for Continental Telephone Company of California

Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

DECLARATION OF SERVICE BY MAIL

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the City and County of San Francisco, California, in which city and county the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 405 Montgomery Street, San Francisco, California 94104. I served the foregoing Petition for Rehearing and Partial Stay to the California Public Utilities Commission from Orrick, Herrington, Rowley & Sutcliffe by placing a copy thereof in a separate envelope for each addressee named in Exhibit A hereto.

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Francisco, California, on August 17, 1972.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 17, 1972, at San Francisco, California.

/s/ CAROL A. TENCH

CAROL A. TENCH

Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

EXHIBIT A

RICHARD W. ODGERS and JAMES B. YOUNG, Attorney at Law, 225 Bush Street, San Francisco, California 94104, appearing for The Pacific Telephone and Telegraph Company, Applicant.

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ROSS WORKMAN, Attorney at Law, 550 California Street, San Francisco, California 94104, appearing for California-Pacific Utilities Company, Interested Party.

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NEAL C. HASBROOK, 760 Market Street, San Francisco, California 94102, appearing for California Independent Telephone Association, Interested Party.

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Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

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RICHARD J. MOORE, Attorney at Law, County Counsel, by JACOB LEVITAN, Attorney at Law, Deputy, 1221 Oak Street, 4th Floor Administration Building, Oakland, California 94612, appearing for the County of Alameda, Interested Party.

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Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

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DIAMANTES P. KATSIKARIS, 619—15th Street, Oakland California 94612, appearing for Independent Taxpayers Union of California, Interested Party.

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GARRET SHEAN, Attorney at Law, 1445 Montgomery Street, San Francisco, California 94133, appearing for Self and Consumers Arise Now, Interested Party.

MRS. SYLVIA M. SIEGEL, P. O. Box 741, Sausalito, California 94965, appearing for Self and Association of California Consumers, Interested Party.

BACIGALUPI, ELKUS, SALINGER & ROSENBERG, Attorneys at Law, by CLAUDE N. ROSENBERG, 3300 Bank of America Center, 555 California Street, San Francisco, California 94104, appearing for Telephone Answering Services of California, Inc., Interested Party.

Petition for Rehearing or Modification and Partial Stay of Decision No. 80346

GOLD, HERSCHER & TABACK, Attorneys at Law, by LESSING E. GOLD, 8500 Wilshire Boulevard, Suite 703-05, Beverly Hills, California 90211, appearing for Western Burglar & Fire Alarm Association and American District Telegraph Association, Interested Party.

RICHARD D. GRAVELLE, Attorney at Law, LEONARD SNAIDER, Attorney at Law, TEDD F. MARVIN and JOHN J. GIBBONS, 350 McAllister Street, San Francisco, California 94102, appearing for the Commission staff.

Petition for Modification, Rehearing and Stay of Decision No. 80346

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application No. 51774
(Filed March 17, 1970)

In the matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Case No. 9036
(Filed April 13, 1970)

WILLIAM M. BENNETT, Consumer Spokesman, and Consumers Arise Now, an association,

Complainants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

Petition for Modification, Rehearing and Stay of Decision No. 80346

Case No. 9042
(Filed April 2, 1970)

144 Spanish-Speaking Telephone Subscribers From San Francisco, Sonoma, and Imperial Counties, The Spanish-Speaking/Surnamed Political Association, The Mexican-American Political Association, The Healdsburg and Windsor Local Action Councils,

Complainants and (Proposed) Protestants,

vs.

The Pacific Telephone and Telegraph Company, a corporation,

Defendant and Applicant in Proposed Rates Increase #51774

Case No. 9043
(Filed April 6, 1970)

William M. Bennett, Consumer Spokesman, and Consumers Arise Now, an association,

Complainants,

vs.

Western Electric Company, joining Pacific Telephone and Telegraph Company and American Telephone and Telegraph Company as Interested Parties,

Defendants.

Petition for Modification, Rehearing and Stay of Decision No. 80346

Case No. 9044
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.

Case No. 9045
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations and certain telephone corporations.

PETITION FOR MODIFICATION, REHEARING AND STAY OF DECISION No. 80346

General Telephone Company of California (General) respectfully requests that Decision No. 80346, issued August 8, 1972, be modified so as to limit any refunds ordered solely to the revenues of The Pacific Telephone and Telegraph Company (Pacific) accruing from the rates authorized in Decision No. 78851, requests rehearing of Decision No. 80346 and further requests that Decision No. 80346 be stayed pending the rehearing and modification requested herein.

In support of this petition, General alleges as follows:

1. The Decision of the Supreme Court of California annulling Decision No. 78851 (*City of Los Angeles* v. *Public Utilities Commission*, 7 C.3d 331) was applicable solely to

The Pacific Telephone and Telegraph Company. The Court stated:

> "The Commission is further directed to order *Pacific* to make refunds in accordance with the views expressed herein." (7 C.3d 359; emphasis added)

This Commission in Decision No. 78851, issued June 22, 1971, in Ordering Paragraph No. 3 provided:

> "3. The filing by Pacific of the revised rate schedules authorized herein shall constitute acceptance by Pacific of the requirement that if, as a result of the pending review of Interim Decision No. 77984 by the California Supreme Court, these proceedings are reopened and lower revised rates are authorized, Pacific must refund to its customers, under a plan acceptable to this Commission, any difference between the amounts charged in the interim and the amounts that would have been charged at the rates authorized in the reopened proceedings. In order promptly to effect the refunds which would be required under those circumstances, Pacific shall maintain records of intrastate charges to each of its customers (excluding coin box collections) beginning with the effective date of the rates authorized herein and continuing until further order of this Commission." (mimeo, pp. 67-68)

Decision No. 80346, by Finding No. 3 and Ordering Paragraph No. 3, requires General to make refunds even though General was not ordered to make refunds by the Decision of the Supreme Court. General was not bound by the refund provision of Decision No. 78851 by the very terms of that provision and its rates were not impounded pending the appeal, as were Pacific's. For a decision limiting re-

funds of intrastate toll rates to a Bell Co., without affecting the rates of independent companies, see *Southern Bell Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n,* (1961) 242 LA 24, 134 So.2d 61.

General requests that the refund plan ordered in Decision No. 80346 be modified and limited to refunds solely to the revenues of Pacific accruing from the rates authorized in Decision No. 78851.

2. General has been deprived of due process of law in violation of its rights granted by the California and United States Constitution because it was not granted a hearing in the question of refunds, even though in oral argument on August 4, 1972, General asked for such a hearing (Tr. 9213). As the California Supreme Court stated in *Pacific Tel. & Tel. Co.* v. *Public Util. Com.,* 62 C.2d 634, 675:

> "They [the independents] are also fearful that the reduction of Pacific will mean a possible Commission order to reduce their own rates, before they have been afforded a hearing by the Commission. Suffice it to say that the provision of Sections 1705 and 728 . . . and the views expressed in this opinion should serve to reassure the independents to the contrary. The Commission is cautioned accordingly."

General requests that a hearing be held for the purposes of properly structuring a refund plan limited solely to the revenues of Pacific accruing from the rates authorized in Decision No. 78851 and for the receipt of evidence as to the extent that refunds, if any, should be required by General and the effects thereof. At such hearing General will be prepared to present a plan to limit refunds solely to the revenues of Pacific accruing from the rates authorized in Decision No. 78851.

Petition for Modification, Rehearing and Stay of Decision No. 80346

3. General's present rates were fixed and established by Decision No. 79367. In that Decision this Commission found that General was entitled to an increase in annual gross revenues of $40,288,000. In determining a proper spread of the additional gross revenue requirement, the Commission stated that it was influenced in large measure by Decision No. 78851, issued on June 22, 1971, in the general rate proceeding of Pacific and related matters (Application No. 51774 and, among others, Case No. 9045). The Commission's adopted rate spread yielding an annual gross revenue increase of $40,288,000 for General in Decision No. 79367 included $16,335,000 of revenues derived from rate changes made in Decision No. 78851.

While this $16,335,000 increase became effective when Decision No. 78851 became effective because of General's toll concurrence, prescribed and required by this Commission in Decision No. 74917, this Commission in Decision No. 79367 found and determined that General was entitled to, and ordered that General receive a gross annual revenue increase that included the revenues from rates that were predetermined in Decision No. 78851.

General's rates and charges, including message toll and MMU rates and charges, are the result of Decision No. 79367, and were approved, established, authorized or confirmed by Decision No. 79367, and were the only lawful rates General could charge.

By Decision No. 79431, dated November 30, 1971, this Commission denied an application for a stay by the City of Long Beach of the increased rates authorized by Decision No. 79367. Decision No. 79367 has been reopened and has been assigned for hearing and any order affecting the rates authorized and approved in that Decision can only be made in that particular case.

The refunds now ordered in Decision No. 80348 would reduce General's annual revenues authorized in Decision No. 79367 by approximately $20,000,000; the Commission by including revenues from rates predetermined in Decision No. 78851 in the rate spread could not have intended that General be subsequently so deprived of its reasonable revenue requirement and prevented from earning the rate of return authorized in Decision No. 79367.

4. Message toll and MMU rates, predetermined for General in Decision No. 78851, and charged and collected by General under its filed concurrence, were the only lawful rates that General could charge and there was no stay of these rates as to General; payments made under these lawful rates are not subject to refund even though Decision No. 78851 was reversed on review.

The Supreme Court of Illinois in *Mandel Bros.* v. *Chicago Tunnel Terminal Co.*, (1954) 2 Ill. 2d 205, 117 NE 2d 774 at 775 of 117 NE 2d held:

> "The fundamental issue in this case is whether a rate which has been approved by the Commerce Commission after a hearing as to its reasonableness can be termed an 'excessive' rate for the purpose of awarding reparations. We hold that it cannot, even though the rate approved by the commission has subsequently been set aside upon judicial review.
>
> "The operation of the rate approved by the commission was not stayed by the circuit court, and Mandels did not request that it be stayed.
>
> "It follows that the rate approved by the Commerce Commission as just and reasonable was the rate which the utility was required to charge so long as the order

of the commission remained in effect. It cannot therefore be said that in charging that rate the utility charged an excessive rate which gave rise to a claim for reparations."

Likewise, the Supreme Court of Ohio in *Keco Industries* v. *Cincinnati & Suburban Bell Telephone Co.*, (1957) 166 Ohio St. 254, 141 NE 2d 465, cert. den. 355 U.S. 182 said:

"In the present case we have rates which were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, until such time as they were set aside by the supreme court, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility."

In *Pacific Tel. & Tel. Co.* v. *Public Util. Com.*, (1965) 62 C.2d 634, 652, the Supreme Court of California cited these cases with approval, stating:

"In at least two cases it has been held that a utility whose rates had been commission-approved could not be compelled to make refunds of new and increased rates collected under a commission order set aside on appeal, where the order had not be stayed."

(See Pub.U.C. 734)

Also the United States Supreme Court in *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, (1932) 284 U.S. 370 said:

"Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, . . . by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto

to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

The doctrine of these cases was not applicable to Pacific because it was under an express refund obligation.

For all of the foregoing reasons, General respectfully requests that the Commission issue its Order to the following effect:

1. Modifying Decision No. 80346 so as to limit any refunds to the revenues of Pacific accruing from the rates authorized in Decision No. 78851.

2. In the alternative, granting a rehearing of Decision No. 80346, to take evidence to determine a refund plan equitable to all subscribers and limited solely to the revenues of Pacific accruing from the rates authorized in Decision No. 78851, and for the receipt of evidence as to the extent that refunds, if any, should be required by General and the effects thereof.

3. Staying Decision No. 80346 pending the rehearing and modification requested herein.

DATED at Santa Monica, California, August 15, 1972.

Respectfully submitted,

ALBERT M. HART
H. RALPH SNYDER, JR.
JOHN ROBERT JONES
By /s/ A. M. HART
Attorneys for General Telephone Company of California

Petition for Modification, Rehearing and Stay of Decision No. 80346

RICHARD L. OHLSON, under penalty of perjury, certifies as follows:

He is an officer, to wit, Vice President, of General Telephone Company of California, a corporation, that he has read the foregoing Petition For Modification, Rehearing and Stay Of Decision No. 80346 and knows the contents thereof, and the same is true of his own knowledge, except as to such matters which are therein stated on information or belief, and as to those matters he believes it to be true.

DATED at Santa Monica, California, August 15, 1972.

/s/ RICHARD L. OHLSON

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition For Modification, Rehearing And Stay Of Decision No. 80346 upon All Appearances of record in this proceeding by mailing a copy thereof to each such party.

Dated at Santa Monica, California, August 16, 1972.

/s/ BRENDA J. DAVIS

Petition for Writ of Review and Memorandum of Points and Authorities In Support Thereof

S. F. No. .....

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, an unincorporated association, GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, a corporation,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of and constituting said Public Utilities Commission,

Respondents.

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S. F. No. .....

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, an unincorporated association, GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, a corporation,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of and constituting said Public Utilities Commission,

Respondents.

PETITION FOR WRIT OF REVIEW

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

California Independent Telephone Association ("CITA"), an unincorporated association, General Telephone Company of California ("General"), a California corporation, and Continental Telephone Company of California ("Continental"), a California corporation (collectively "Petitioners"), respectfully request that this Court determine the lawfulness of Decision Nos. 80346,* dated August 8, 1972, and 81212,* dated March 27, 1973, of The

* Attached hereto as Appendix A and Appendix B, respectively.

Public Utilities Commission of the State of California ("Respondent"), insofar as such Decisions order refunds by Petitioners of intrastate message toll revenues and of multi-message unit revenues in the Los Angeles area.

In support of this petition, Petitioners respectfully allege:

I

Preliminary Statement

1. Public utility telephone service in California is rendered by The Pacific Telephone & Telegraph Company ("Pacific"), an affiliate of American Telephone & Telegraph Company, and twenty-eight independent telephone companies, including General and Continental, who are not so affiliated. CITA is an unincorporated non-profit trade association comprised of the twenty-eight independent telephone companies above mentioned.

2. Among the various categories of service afforded by the telephone companies in California are the following:

(a) *Local service.* Broadly speaking, this is the service afforded at a fixed monthly rate whereby calls within a defined area known as the free-calling or exchange area may be made without any additional charge.

(b) *Intrastate message toll service.* This involves calls from one point within the state to another distant point within the state outside of the free-calling area and not embraced within multi-message unit service. Intrastate toll calls are chargeable at rates which vary according to the distance that the call travels.

(c) *Multi-message unit service ("MMU").* This is a form of commuted toll service existing only in the San

Francisco and Los Angeles metropolitan areas. It involves calls to nearby areas which are beyond the free-calling area of local service and which are chargeable at a prescribed number of message units per call. The number of message units chargeable on particular calls varies with the distance between the local exchange and the terminus of the call.

3. In the case of intrastate toll service, the facilities of both Pacific and one or more of the independents are often involved for a single telephone call. In the case of MMU service in the Los Angeles area, the facilities of both Pacific and General are often involved on a single telephone call.

II

Ratemaking Procedures for Intrastate Toll Service and MMU and Division of Revenues Therefrom

1. *Intrastate Toll Service.* Because of the chaos which would otherwise exist, Respondent has established the policy that all intrastate toll rates shall be uniform no matter in which telephone company's area the call originates or terminates, and consequently views the statewide toll network as a whole. As a matter of procedural necessity, these uniform toll rates are fixed in the course of Pacific's general rate proceedings, with the result that in such proceedings, in addition to rates fixed only for Pacific (i.e., its local exchange rates), intrastate toll rates are established not only for Pacific but for the independents as well. All independents are made parties to such proceedings for the purpose of fixing such toll rates.

2. Once intrastate toll rates have been established in Pacific's rate proceedings, and Pacific files appropriate

tariffs, the independents file a concurrence on such tariffs and adopt them as their own.

3. Although intrastate toll service involves the use of the facilities of all twenty-nine telephone companies, because of its size, Pacific charges and collects the bulk of total intrastate toll revenues. Under agreements between Pacific and the independents and a decision of Respondent, the revenues from intrastate toll service are shared by Pacific and the participating independents providing toll service according to a true "division of revenue" concept. All of the revenues and expenses of intrastate toll service are pooled and the net revenues of the pool are in effect divided among the participating companies in proportion to the amount of telephone plant devoted by the respective participating companies to intrastate toll service. Intrastate toll rates are established by Respondent at a level sufficient to recover the entire cost of service for all of the participating companies and provide a reasonable return on the telephone plant devoted to such service by each of the participating companies. The procedure for dividing the revenues from intrastate toll service outlined above is referred to as "settlements." The procedure for allocating expenses and telephone plant to intrastate toll operations is termed "separations."

4. *MMU Service.* In the San Francisco metropolitan area all MMU routes are between exchanges of Pacific, and no independent company is involved. In the Los Angeles metropolitan area, however, certain MMU routes are between exchanges of Pacific and General. For the same reasons that intrastate toll rates must be uniform so must MMU rates. Similarly, as a matter of procedural necessity, these uniform MMU rates are established for both Pacific

and General in rate proceedings involving Pacific and the independents, and the revenues from this service are shared between Pacific and General under settlement arrangements similar to the division of intrastate toll revenues.

III

The Proceedings Below

1. On March 17, 1970 Pacific filed Application No. 51774 with Respondent for Authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California. Subsequently three complaints against Pacific were filed with Respondent, being Cases No. 9036, 9042, 9043, and two investigations were instituted by Respondent on its own motion, being Cases No. 9044 and 9045. Case No. 9045 made all independents parties to the proceeding and involved the determination of appropriate intrastate toll and Los Angeles area MMU rates. All of these matters were consolidated and after extended hearings Respondent rendered its Decision No. 78851 on June 22, 1971, authorizing rates for telephone service which would result in an estimated $143 million annual increase in revenues to Pacific after settlements with the independents. A copy of said decision is attached as Appendix A to the Petition for Writ of Review to this Court in S.F. No. 22832 which resulted in *City of Los Angeles* v. *Pub. Util. Comm'n*, 7 Cal.3d 331 (1972).

2. On July 21, 1971, this Court issued a partial stay of Decision No. 78851 as follows:

> "All sums collected *by Pacific* . . . pursuant to the rates authorized by Decision 78851 shall be subject to refund in whole or in part upon order of this Court

should decisions 77984 or 78851 be annulled or modified by this Court." (Emphasis added).

3. On July 22, 1971, Pacific placed into effect the new tariffs authorized by Decision No. 78851. The increased toll rates and Los Angeles MMU rates for which concurrences had to be filed by the independents became their adopted lawful rates.

4. On November 26, 1971, this Court annulled Decision No. 77984 (*City & County of San Francisco* v. *Pub. Util. Com'n.* 6 Cal.3d 119), and the proceedings were subsequently reopened to consider various lawful alternatives in the method of calculating depreciation for federal income tax expense.

5. On June 9, 1972, this Court annulled Decision No. 78851 (*City of Los Angeles* v. *Pub. Util. Com'n.* 7 Cal.3d 331), and "directed [Respondent] to order Pacific to make refunds in accordance with the views expressed" in the Court's decision. Further review of the Court's decision ended without success on July 28, 1972, when the Supreme Court of the United States denied Pacific's Application for Stay of Mandate.

6. On August 8, 1972, Respondent issued Decision No. 80346 ordering the independents to make refunds as well as Pacific, specifically to "refund all monies collected over and above Pacific's rate levels affecting . . . [them] in effect prior to July 23, 1971, less the rate increments authorized in Decisions No. 79873 and 79941, plus interest to date of refund at 7 percent, to all present and former customers; . . ."

7. General filed a petition for modification, rehearing and stay of Decision No. 80346 on August 16, 1972, and CITA

and Continental filed similar petitions on August 17, 1972. Said petitions and stay were granted as to Petitioners on September 12, 1972 by Respondent's Decision No. 80487. Rehearing was held on December 1, 1972, after which Respondent issued Decision No. 81212 (Appendix B) affirming Decision No. 80346 and dissolving the stay granted in Decision No. 80487.

IV

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1756-1767 of the Public Utilities Code which authorizes this Court to review decisions of Respondent to determine whether or not Respondent has regularly pursued its authority, including a determination of whether or not the decision under review violates any right of Petitioners under the Constitution of the United States or of the State of California. Jurisdiction includes a determination of whether Respondent made sufficient findings of fact, acted on proper and substantial evidence, and where it is contended that the rights guaranteed Petitioners under the Constitution of the United States have been violated, an exercise of an independent judgment on the law and facts.

V

Grounds for Review

Petitioners contend that the fact that Respondent erroneously calculated Pacific's additional revenue requirement does not justify Respondent ordering the independents to refund the increase in intrastate toll and MMU revenues which they derived from the rates authorized for them in Decision No. 78851. Petitioners urge that Respondent has not regularly pursued its authority and that

Decision No. 80346 is improper and unlawful for the following reasons:

1. *The decision of this Court in City of Los Angeles* v. *Pub. Util. Comm'n,* 7 Cal.3d 331 (1972) does not require or justify any refunds by the independents.

2. Decision Nos. 80346 and 81212 require the independents to refund revenues lawfully collected by them.

3. Decision Nos. 80346 and 81212 operate to deprive the independents of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

VI

Conclusion

A writ should issue herein to bring the entire record before this Court for review, and upon such review it should be determined that:

1. Respondent did not regularly pursue its authority in its rendition of Decision No. 80346.

2. Decision No. 80346 violates the rights of the independent telephone companies under the Constitution of the United States and under the Constitution of California.

3. Paragraphs 3, 4 and 5 of the Findings and the same paragraphs of the Order contained in Decision No. 80346 should be annulled, and Decision No. 81212 should be annulled in its entirety.

Petitioners' attached memorandum of points and authorities is incorporated herein by reference for all purposes.

WHEREFORE, Petitioners respectfully pray that:

A writ of review be issued by this Honorable Court to determine the lawfulness of Decision No. 80346, as affirmed by Decision No. 81212.

Dated: April 26, 1973.

Respectfully submitted,

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By s/ Claude N. Rosenberg
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Attorneys for Continental Telephone Company of California

By s/ Robert J. Gloistein
Robert J. Gloistein

VERIFICATION

I am the Executive Vice President of the Petitioner California Independent Telephone Association in the above entitled action; I have read the foregoing PETITION FOR WRIT OF REVIEW and know the contents thereof; and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Dated this 26th day of April, 1973 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Neal C. Hasbrook
Neal C. Hasbrook

VERIFICATION

I am a Vice President of the Petitioner, General Telephone Company of California, in the above-entitled action; I have read the foregoing PETITION FOR WRIT OF REVIEW and know the contents thereof; and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

Dated this *26th* day of *April*, 1973 at Santa Monica, California.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Richard L. Ohlson
Richard L. Ohlson

VERIFICATION

I am one of the attorneys for the petitioner Continental Telephone Company of California in the above entitled action and said petitioner is outside the county in which I have my office and for that reason I make this verification on its behalf; I have read the foregoing PETITION FOR WRIT OF REVIEW and know the contents thereof; and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters I believe it to be true.

Executed this *26th* day of *April*, 1973 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ROBERT J. GLOISTEIN
ROBERT J. GLOISTEIN

S. F. No. ....

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, an unincorporated association, GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, a corporation,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of and constituting said Public Utilities Commission,

Respondents.

MEMORANDUM OF POINTS AND AUTHORITIES, IN SUPPORT OF PETITION FOR WRIT OF REVIEW

PRELIMINARY STATEMENT

The California Independent Telephone Association ("CITA"), Continental Telephone Company of California ("Continental") and General Telephone Company of California ("General") (collectively, "Petitioners" or "Independents") respectfully request that this Court issue its Writ of Review to the California Public Utilities Commission ("Respondent") and thereupon determine the lawfulness of Respondent's Decision Nos. 80346, dated August 8, 1972, and 81212, dated March 27, 1973, (hereinafter col-

lectively called "the refund order") as the same applies to Petitioners.

In attempting to implement this Court's direction to Respondent to require The Pacific Telephone and Telegraph Company ("Pacific") to make refunds of the increase of rates collected pursuant to Respondent's Decision No. 78851 (*City of Los Angeles* v. *Pub. Util. Comm'n*, 7 Cal.3d 331, 359 (1972), Respondent issued Decision No. 80346 and included in that Decision an order that the independents, as well as Pacific, make refunds of revenues derived from rates authorized for both Pacific and the independents in Decision No. 78851.*

Petitioners contend that, when it construed *City of Los Angeles* to require the independents to refund their lawfully earned revenues, Respondent did not regularly pursue its authority and acted contrary to this Court's directive in *City of Los Angeles*, and that, if the refund order is allowed to stand, the independents will be deprived of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

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* "Our understanding of the Supreme Court Decision is that the Court has directed us to order Pacific to refund all rates collected in excess of those in effect prior to July 23, 1971, less the rate increments authorized in Decision Nos. 79873 and 79941. We shall so order. Because Pacific shares its message toll rate revenue with 28 independent telephone companies in California, and its message unit revenue with General Telephone, all such independent companies shall also be required to make refunds accordingly." (Appendix A, pp. 4 and 5)

ARGUMENT

I

THE REFUND REQUIREMENT OF CITY OF LOS ANGELES APPLIES ONLY TO THE REVENUES OF PACIFIC. NO STAY, IMPOUND OR REFUND ORDER AS TO THE RATES AUTHORIZED BY DECISION NO. 78851 EVER ISSUED AGAINST THE INDEPENDENTS.

The Decision of this Court annulling the Commission's Decision No. 78851 (*City of Los Angeles* v. *Publ. Util. Comm'n*, 7 Cal.3d 331 (1972)) was applicable solely to Pacific. This Court stated:

> "The Commission is further directed to order *Pacific* to make refunds in accordance with the view expressed herein" (7 Cal. 3d, at 359; emphasis added).

No mention was made anywhere in *City of Los Angeles* of the rates or revenues, or effects thereon, of the independent telephone companies, and it is respectfully submitted that this Court in its deliberations leading to *City of Los Angeles* never considered the independents.

Furthermore, Respondent, in Decision No. 78851, in authorizing increased rates for Pacific subject to possible refund because of the then pending review of Respondent's Decision No. 77984* with respect to accelerated depreciation, directed its refund requirements solely to Pacific:

> "The filing by Pacific of the revised rate schedules authorized herein shall constitute acceptance by Pacific of the requirement that if, as a result of the pending review of Interim Decision No. 77984 by the California Supreme Court, these proceedings are reopened and lower revised rates are authorized, Pacific must refund to its customers, under a plan acceptable to this Com-

* Annulled by *City & County of San Francisco* v. *Pub. Util. Comm'n*, 6 Cal. 3d 119 (1971).

> mission, any difference between the amounts charged in the interim and the amounts that would have been charged at the rates authorized in the reopened proceedings. In order promptly to effect the refunds which would be required under these circumstances, Pacific shall maintain records of intrastate charges to each of its customers (excluding coin box collections) beginning with the effective date of the rates authorized herein and continuing until further order of this Commission." (Decision No. 78851, Mimeo, pp. 67-68)

Thus, Petitioners were bound neither by the refund provision of *City of Los Angeles* nor by the refund condition attached to Decision No. 78851.

In *Southern Bell Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n*, 242 L. A. 24, 134 So. 2d 61 (1961), the Commission and the Court were confronted with a situation analogous to the present case. The Commission had ordered refunds of 20% of Southern Bell's charges for intrastate toll for a stated period of time. In subsequent proceedings it was made clear by the Commission and affirmed by the Court with respect to interchanged traffic with independents, the refund would be comprised only of 20% of Southern Bell's revenues, even though the refund was made to customers of independent companies. The revenues received by the independent companies were not required to be refunded.

It is evident that this Court in *City of Los Angeles* was concerned only with the revenues of Pacific:

> "In these consolidated proceedings we review Decision No. 78851 of the Public Utilities Commission which authorize intrastate telephone rates in the amount of $143 million annually. We have issued a partial stay providing that all sums collected by Pacific Telephone

and Telegraph Company pursuant to the rates authorized by the Decision shall be subject to refund in whole or in part upon order of this court should the Decision or Decision No. 77984 of the Commission be annulled or modified" (7 Cal.3d, at 336).

The $143 million revenue increase authorized by Decision No. 78851 were revenues flowing exclusively to Pacific although the rates authorized by Decision No. 78851 produced additional revenues for the independents as well.* Petitioners were parties to Application No. 51774 and respondents in Case No. 9045 consolidated therewith. Since it is only Pacific's revenue requirement that the California Supreme Court found improperly calculated, the only refunds which can lawfully be ordered are the excess revenues derived by Pacific under Decision No. 78851. There has never been any indication by any party to these proceedings, by Respondent or by the Supreme Court, that, with respect to Decision No. 78851, the anticipated $6 million of additional toll revenues provided for independent companies and *$6.2* million of additional MMU revenues for General were not required lawful revenues for the independent companies.

For Respondent now to attempt to impose its refund order on Petitioners is contrary to the law as enunciated by this Court in *City of Los Angeles,* which was directed only to Pacific, and if permitted would deprive Peti-

* The sources of increased revenues to Pacific making up the $143 million are shown in a table in Decision No. 78851 (Mimeo p. 49). It will be there noted under the heading "Toll," for example, that the authorized rates produced a total of $21 million in annual toll revenue increases but only $15 million is included in Pacific's $143 million, with the balance of $6 million going to the independents by way of settlements. Similarly, increased Los Angeles area MMU rates produced an estimated $6.2 million in revenues for General (Appendix B, p. 2).

tioners of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II

THE RATES AUTHORIZED BY DECISION NO. 78851 WERE THE ONLY LAWFUL RATES PETITIONERS COULD CHARGE AND WERE FINAL RATES; THE REVENUES DERIVED THEREFROM ARE THE PROPERTY OF PETITIONERS; AND TO REQUIRE REFUNDS WOULD CONSTITUTE RETROACTIVE RATEMAKING.

All of Petitioners adopt Pacific's intrastate toll rates through tariff concurrences and General concurs in Pacific's multiple message unit rates in the Los Angeles Metropolitan Area.*

For a number of years, Pacific has been the tariff filing utility for toll and Los Angeles area MMU rates:

> "We find it to be fair and reasonable that Pacific should be the tariff filing utility for Los Angeles extended area interchanged multi-message unit traffic and it is appropriate that the other utilities' tariff reflect the same by suitable reference in the respective schedules" (*Pacific Tel. & Tel. Co.*, 56 Cal. P.U.C. 80, 87 (1957)).

> "Applicant [Pacific] is the tariff filing utility for toll service generally throughout the state and accordingly has the obligation and responsibility of seeing that each of the connecting independent telephone companies receives its costs and a fair return on the plant devoted to the service. The increases in toll rates

* Multiple message unit service (MMU) is a form of commuted toll service existing only in the San Francisco and Los Angeles Metropolitan Areas for calls beyond the local free calling area which are chargeable at a prescribed number of message units per call. In Decision No. 78851 the charge per message unit was increased from 4.05¢ to 4.7¢.

authorized herein apply both to the intrastate toll traffic of applicant and to the intrastate toll traffic interchanged between applicant and the connecting companies." (*Pacific Tel. & Tel. Co.*, 56 Cal. P.U.C. 277, 291 footnote (1958)).

In 1968, Respondent established the principle that intrastate toll rates would be uniform throughout the state and that the statewide toll network would be viewed as a whole, even though it is comprised of the facilities of 29 different telephone companies.

"Message toll users constitute a single rate-paying class distinguished from their role of subscribers to local exchange service" (*Pacific Tel. & Tel. Co.*, 69 Cal. P.U.C. 53, 74 (1969)).

Respondent discussed in great detail the many common problems which confront the participants in the statewide toll network, such as service standards, type and quality of facilities and the mix of various toll route lengths and densities.

"From the evidence, we find that establishment of a uniform message toll rate at a level sufficient to support the entire intrastate integrated toll network is in the public interest" (69 Cal. P.U.C., at 76).

"Each [independent] shall file with this Commission within twenty days after the effective date of this order and in conformity with the provisions of General Order No. 96-A, concurrence in the message toll telephone tariffs of Pacific as set forth in Appendix B attached hereto" (69 Cal. P.U.C., at 94).

Respondent has not only ordered the Petitioners to concur in Pacific's intrastate toll and MMU tariffs but has

prescribed and directed Petitioners to conform to the precise language by which such concurrence is implemented.* Thus, although toll rates are fixed as part of a proceeding involving all of the rates of Pacific, the establishment of such toll rates applies to all telephone companies in the state jointly engaged in the rendition of toll service. Such rates are fixed for both Pacific and the independents and at a level which will yield the independents as well as Pacific a reasonable return on that segment of their operations. As between Pacific and General, the same is true as to the establishment of Los Angeles area MMU rates. In Application No. 51774, both General and Continental filed briefs with Respondent presenting argument with respect to toll and MMU rates.

When the rates authorized in Decision No. 78851 became effective, those rates automatically became the only rates that the independents could lawfully charge by virtue of the concurring tariffs ordered by Respondent. Furthermore, as to the independents, those rates became final rates since the independents were never included in any stay, refund or impound directive either of this Court or of Respondent. As to Petitioners, the revenues derived from these rates so established by final order became the property of Petitioners. The attempted refund order of Respondent would confiscate Petitioners' property in violation of the Fourteenth Amendment to the United States

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* The tariff language ordered by Respondent was as follows: "The ..... Telephone Company assents to, adopts, and concurs in the tariffs of The Pacific Telephone and Telegraph Company listed below, together with amendments thereto and successive issues thereof, and hereby makes itself a party thereto until this authority is revoked by cancellation of this adoption notice, for the purpose of furnishing all intrastate message toll telephone service thereunder originated at or terminated at a point of this Company" (Decision No. 74917, Appendix B, not printed in 69 Cal. P.U.C., see further Appendix B, hereof, p. 3.).

Constitution and constitute the very type of retroactive ratemaking that this Court expressly condemned in *Pacific Tel. & Tel. Co.* v. *Pub. Util. Comm'n*, 62 Cal. 2d 634, 652 (1965):

> "In at least two cases it has been held that a utility whose rates had been commission-approved could not be compelled to make refunds of new and increased rates collected under a commission order set aside on appeal, where the order had not been stayed. (See *Keco Industries, Inc.* v. *Cincinnati & Suburban Bell Tel. Co.* (1957) 166 Ohio St. 254, [141 N.E.2d 465, 468-469], appeal dism., cert. den. 355 U.S. 182, [78 S.Ct. 267, 2 L.Ed.2d 187]; *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.* (1954) 2 Ill.2d 205 [117 N.E.2d 774, 776-777].)" *

In *Mandel Bros.* the court said:

> "The operation of the rate approved by the Commission was not stayed by the Circuit Court, and Mandels did not request that it be stayed.
>
> "It follows that the rate approved by the Commerce Commission as just and reasonable was the rate which the utility was required to charge so long as the order of the Commission remained in effect" (177 N.E.2d, at 775).

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* The Commission, in Decision No. 81212, attempts to distinguish *Pac. Tel. & Tel. Co.*, and cases cited therein, saying that "the Independents are not 'a utility whose rates had been commission approved.'" (Appendix B, p. 11). The rates in question were found reasonable in Decision No. 78851 (Finding No. ††, Mimeo. p. 66) and by virtue of the Commission's policy as to uniform toll rates (Supra, p. 24) were indeed "Commission approved" as to the Independents. Further, as the Commission concedes, "Neither the Commission nor the Supreme Court directed a stay order to the Independents" (Appendix B, p. 10).

In *Keco*, to the same effect:

> "In the present case we have rates which were established by the proper designated authority after a hearing and consideration and full compliance with the law and until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the only ones which could be collected by the utility" (141 N.E.2d 468).

Also to the same effect: *Arizona Grocery Co.* v. *Atcheson, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Farmers Union Livestock Comm'n.* v. *Union Pacific R.R.*, 135 Neb. 689, 283 N.W. 498 (1939); *Straube* v. *Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W. 2d 666 (1950). In the latter case the Court said:

> "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."

It is clear that this is still the law of California, for in *City of Los Angeles* this Court expressly adhered to and reaffirmed its ruling against retroactive ratemaking. The Court's order in that case requiring Pacific to make refunds is, of course, in no way inconsistent with that rule, and Pacific's duty to make appropriate refunds was uncontroverted, for both Respondent and this Court had imposed a refund obligation upon Pacific. Only the scope of the refund was in issue, and this Court held that under the doctrine of the cases referred to above, Respondent could not limit the amount of the refund by establishing rates retroactively.

But, in the case of the independents, the same rule clearly forbids the imposition of any refund requirement. No refund obligation or stay was imposed against them and the facts applicable to them are indistinguishable from those in the cases referred to above.

III

In Any Event, the Commission Exceeded Its Authority in Failing to Make Proper Findings in Decision Nos. 80346 and 81212 as to Whether the Independents Should Be Required to Make Refunds.

Public Utilities Code Section 1705 provides *inter alia* "the Decision shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision." The only findings with respect to the Petitioners in the refund order state in essence that Petitioners shall refund all monies collected over and above Pacific's rate levels affecting Petitioners in effect prior to July 23, 1971, less the rate increments authorized in Decision Nos. 79873 and 79941, plus interest (Appendix A, pp. 5-6). The foregoing language exemplifies the typical "ultimate finding" that was struck down in *California Motor Transport Co.* v. *Pub. Util. Comm'n*, 59 Cal.2d 270, 273 (1963). There the Court said:

> "Every issue that must be resolved to reach that ultimate finding is 'material to the order or decision.' Statutes like 1705 have been held to require findings of the basic facts upon which the ultimate findings is based [Citations]."

In *City of Los Angeles*:

> "It has been repeatedly emphasized that separate findings are essential to 'afford a rational basis for judicial

> review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action' [Citations]" (7 Cal.3d, at 337).

Respondent, in Decision No. 80346, made no finding as to the applicability of the Court's decision in *City of Los Angeles* to the independents. It made no finding of the equitable effects of possible refunds on the independents. It made no finding (because it was unable to do so) that there was an adequate record in the proceedings before it to support a refund order against the independents. In short, Decision No. 80346 is bereft of findings on any issue "material to the order or decision" to satisfy the statutory requirement in reaching the ultimate finding that refunds were due. Decision No. 81212 (Appendix B), which purportedly affirms Decision No. 80346, contains *no* findings at all.

IV

The Independents' Revenue Requirement and Fair Rate of Return are in Large Measure Dependent Upon the Rates Authorized in Decision No. 78851.

As previously stated, the intrastate toll rates are fixed simultaneously for both Pacific and the independents. All twenty-nine telephone companies share in the revenues generated from those rates. General, in the same way, shares in the revenues generated from MMU rates fixed simultaneously for both Pacific and General. Many of the independents have been able to defer requests for local

service rate increases because of revenues realized from the rates authorized in Decision No. 78851. Other independents have been able to request lesser local service rate increases to achieve a fair rate of return because of the revenues flowing to them from the rate increases authorized in said Decision.

Continental, for example, relied upon the increased revenues accruing to it from Decision No. 78851 in determining the timing and magnitude of its own application for rate relief (Application No. 52859, filed September 13, 1971 and presently pending before Respondent). Were it not for such increased revenues, validly authorized by Respondent, Continental would have been compelled to seek emergency interim rate relief from Respondent to avoid severe financial crises. Continental, further, has been an innocent bystander with respect to the annulment of Decision No. 78851, principally upon the grounds the rates authorized therein were based on a "normalization" method of calculating Pacific's depreciation for federal income tax purposes (*City of Los Angeles* v. *Pub. Util. Comm'n*, 7 Cal.3d 331, 337 (1972)). It is a matter of record with Respondent that Continental has for many years used the so-called "flow through" method of accounting for income tax depreciation, and it is therefore clearly unjust and inequitable that it should be deprived of lawfully authorized and collected revenues because Decision No. 78851 was struck down on grounds in no way applicable to Continental.

General, for another example, received an order from Respondent (Decision No. 79367 dated November 22, 1971) authorizing an 8.3% rate of return which Respondent calculated entitled General to an increase in annual gross revenues of $40,288,000. Of that amount, approximately $16 million was imputed to General through revenues to be derived from the rates authorized in Decision No. 78851.

Had General any idea that 40% of the authorized rate increase was to be placed in the jeopardy of possible future refunds ordered by Respondent, General would have insisted on the establishment of increased rates in different categories which it had some reasonable expectation of being able to retain in the future. Decision No. 79367 is presently the subject of rehearing limited solely to the issue of the appropriate method of depreciation to be used for income tax purposes. In all other respects Decision No. 79367 is final. The order of rehearing (Decision No. 79431, dated November 30, 1971) places General under a refund obligation only for the rates "authorized by Decision No. 79367," i.e., rates other than those authorized in the Pacific case.

Because of the finality of the rates authorized in Decision No. 78851 as to the independents, the independents have relied upon the revenues produced from those rates, and have deferred, withheld or reduced requests for urgently needed rate relief. They are now expected by Respondent to disgorge these lawfully collected and urgently required revenues contrary to all equity and good conscience.

Regarding Pacific, the Supreme Court found in *City of Los Angeles* that:

> "It cannot be said on the record before us that *inequity* will result from a refund of the entire increase in rates collected pursuant to the invalid order. The record does not demonstrate that the increased rates are necessitated by changes since the 1968 rate proceeding in the relationship of revenue and expense to the utility" (7 Cal.3d at 357-358; emphasis added).

Plainly no such finding can be made with respect to the independents.

V

Conclusion

Petitioners respectfully submit that the inclusion of the independents within the scope of Respondent's refund order is neither intended by this Court under *City of Los Angeles* nor permissible under this Court's rule against retroactive ratemaking nor lawful under the Fourteenth Amendment to the United States Constitution.

Dated: April 26, 1973

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the City and County of San Francisco, California, in which city and county the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 600 Montgomery Street, San Francisco, California 94111. I served the foregoing PETITION FOR WRIT OF REVIEW AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF by placing a copy thereof in a separate envelope for each addressee named in Attachment A hereto.

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Francisco, California, on April 26, 1973.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

Executed on April 26, 1973 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Carol A. Tench
Carol A. Tench

ATTACHMENT A

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APPENDIX A

Decision No. 80346

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application No. 51774
(Filed March 17, 1970)

In the matter of the Application of

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Case No. 9036
(Filed April 13, 1970)

WILLIAM M. BENNETT, Consumer Spokesman, and CONSUMERS ARISE NOW, an association,

Complainants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

Case No. 9042
(Filed April 2, 1970)

144 Spanish-Speaking Telephone Subscribers from San Francisco, Sonoma, and Imperial Counties, The Spanish Speaking/Surnamed Political Association, The Mexican-American Political Association, The Healdsburg and Windsor Local Action Councils,

Complainants and (Proposed) Protestants,

vs.

The Pacific Telephone and Telegraph Company, a corporation,

Defendant and Applicant in Proposed Rates Increase #51774.

Case No. 9043
(Filed April 6, 1970)

William M. Bennett, Consumer Spokesman, and Consumers Arise Now, an association,

Complainants,

vs.

Western Electric Company, joining Pacific Telephone and Telegraph Company and American Telephone and Telegraph Company as Interested Parties,

Defendants.

Case No. 9044
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of The Pacific Telephone and Telegraph Company.

Case No. 9045
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of all the telephone corporations listed in Appendix A, attached hereto.

OPINION

By Decision No. 78851 dated June 22, 1971 in Application No. 51774, this Commission authorized The Pacific Telephone and Telegraph Company (Pacific) to increase its rates by $143 million annually; the increased rates were effective July 23, 1971. Later, by Decision No. 79873, issued April 4, 1972, and Decision No. 79941, issued April 11, 1972, both in Application No. 52794, this Commission authorized Pacific to increase its rates by $68.9 million annually; the increased rates were effective May 27, 1972. Petitions for review of all three decisions were filed with the Supreme Court of the State of California.

On June 9, 1972, the Supreme Court annulled Decision No. 78851 and directed the Commission as follows: "The decision is annulled. The commission is directed to reinstate the rates of its last lawful order preceding the instant

proceeding provided, however, that it may grant interim rate increases should it find them appropriate while it reconsiders Pacific's application for rate increases. The commission is further directed to order Pacific to make refunds in accordance with the views expressed herein." *City of Los Angeles* v. *Public Utilities Comm.* (1972) 7 C3d 331, 359. This opinion is to comply with those directions. Rate increases will be considered in a separate opinion.

In *Los Angeles* the Supreme Court deferred consideration of Decisions Nos. 79873 and 79941 and said, regarding the rates authorized by those decisions: "However, insofar as the May 27 rates are attributable to the approximately $70 million increase authorized on April 4, they are not subject to refund at this time." (Modification of opinion in *City of Los Angeles* v. *Public Utilities Comm.*, supra, filed July 12, 1972.)

We interpret this to mean that the $68.9 million rate increase authorized by Decisions Nos. 79873 and 79941 is still valid subject to refund if ordered by the Supreme Court.

We will implement the order of the Supreme Court by reinstating the rates of our last lawful order preceding Decision No. 78851 and by continuing in effect the rate increases established in Decisions Nos. 79873 and 79941. The practical effect of our interpretation is illustrated in the following example:

> The basic telephone exchange residence rate in San Francisco on July 22, 1971 was $4.65 a month; the rate increase effective July 23, 1971 raised the basic rate to $5.65 a month; and the increase effective May 27, 1972 raised the basic rate to $5.75 a month. Based on these figures, we interpret the Supreme Court ruling to have invalidated only the $1 increase effective July 23, 1971. The lawful rate to be collected today is the

$4.65 rate of July 22, 1971 plus the $.10 increase of May 27, 1972.[1] The validity of the $.10 rate increase is still pending before the California Supreme Court and may be subject to refund.

As an administrative matter, to have the tariffs in proper sequence we will order Pacific to reinstate the rates of its last lawful order preceding Decision No. 78851. Concurrently, we will authorize Pacific to increase its rates by $55.4 million as set forth in Decision No. 80347 issued this date; and we will authorize Pacific to refile its rate increments heretofore authorized in Decisions Nos. 79873 and 79941 as set forth in Decision No. 80848 issued this date.

Our understanding of the Supreme Court decision is that the Court has directed us to order Pacific to refund all rates collected in excess of those in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941. We shall so order. Because Pacific shares its message toll rate revenue with 28 independent telephone companies in California, and its message unit revenue with General Telephone, all such independent companies should also be required to make refunds accordingly.

All refunds will be made at 7 percent interest from July 23, 1971, until paid. However, refunds of those portions of the rates which reflect local and federal taxes shall be made without interest.

Findings

1. Pacific shall reduce its rates to those in effect prior to July 23, 1971. This is a reduction of $211.9 million at the 1970 level of business.

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[1] This example does not include the rate increase granted this date in Decision No. 80347.

2. Pacific shall refund all monies collected over and above its rate levels in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, plus interest to date of refund at 7 percent, to all present and former customers; except that federal and local taxes shall be refunded without interest. This refund shall be made in conformance with the refund plan attached hereto as Appendix A.

3. General Telephone shall refund all monies collected over and above Pacific's rate levels affecting General Telephone in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, plus interest to date of refund at 7 percent, to all present and former customers; except that federal and local taxes shall be refunded without interest. This refund shall be made in conformance with the refund plan attached hereto as Appendix B.

4. Continental Telephone shall refund all monies collected over and above Pacific's rate levels affecting Continental Telephone in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, plus interest to date of refund at 7 percent, to all present and former customers; except that federal and local taxes shall be refunded without interest. This refund shall be made in conformance with the refund plan attached hereto as Appendix C.

5. All independent telephone companies, respondents in Case No. 9045, except General and Continental, shall refund all monies collected over and above Pacific's rate levels affecting these independent companies in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, plus accumulated interest to

date of refund at 7 percent, to all present and former customers; except that federal and local taxes shall be refunded without interest. This refund shall be made in general conformance with the refund plans attached hereto as Appendices A, B, and C.

ORDER

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company is authorized to file with this Commission, on or after the effective date of this order, revised tariff schedules with rates, charges, and conditions as set forth in Appendix B to Decision No. 80347 and Appendix A to Decision No. 80348 issued concurrently with this order. Until Pacific makes these filings, the rates, charges and conditions of its tariffs in effect on July 22, 1971 shall be the lawful rates, charges, and conditions of Pacific.

2. After the effective date of this order, Pacific shall make refunds to its present and former customers of all monies collected over and above its rate levels in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, for the period beginning July 23, 1971 continuing until the effective date of tariff schedules filed as authorized in Decisions Nos. 80347 and 80348, in conformance with the refund plan attached hereto as Appendix A.

3. After the effective date of this order, General Telephone shall make refunds to its present and former customers of all monies collected over and above Pacific's rate levels affecting General Telephone in effect prior to July 23, 1971, less the rate increments authorized in Decisions

Nos. 79873 and 79941, for the period beginning July 23, 1971 and continuing until the effective date of tariff schedules filed as authorized in Decisions Nos. 80347 and 80348, in conformance with the refund plan attached hereto as Appendix B.

4. After the effective date of this order, Continental Telephone shall make refunds to its present and former customers of all monies collected over and above Pacific's rate levels affecting Continental Telephone in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, for the period beginning July 23, 1971 and continuing until the effective date of tariff schedules filed as authorized in Decisions Nos. 80347 and 80348, in conformance with the refund plan attached hereto as Appendix C.

5. After the effective date of this order, all independent telephone companies, respondents in Case No. 9045, except General and Continental, shall make refunds to their present and former customers of all monies collected over and above Pacific's rate levels affecting these independent telephone companies in effect prior to July 23, 1971, less the rate increments authorized in Decisions Nos. 79873 and 79941, for the period beginning July 23, 1971 and continuing until the effective date of tariff schedules filed as authorized in Decisions Nos. 80347 and 80348, in general conformance with the refund plans attached hereto as Appendices A, B, and C.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 8th day of August, 1972.

I will file a concurring opinion.

/s/ THOMAS MORAN

VERNON L. STURGEON
President

WILLIAM SYMONS, JR.

APPENDIX A

The Pacific Telephone and Telegraph Company Refund Plan

The following procedures will be used to refund increased charges billed as a result of Decision No. 78851 (rates effective July 23, 1971):

A. Computation of Basic Refundable Amount Per Customer

1. Basic Exchange Charges (C.O. Lines and Trunks)

   Each customer will be refunded any increased amounts billed. In Folsom, Fair Oaks, Rio Linda and Mt. Wilson where rates were decreased on July 23, 1971, if the additional amount due on basic service exceeds the refund on other items, no additional amount will be billed. The refund amount for those customers will be zero.

2. Supplemental Equipment and Non-recurring Charges

   Each customer will receive an individually computed refund using the following formula. The total accumulated amounts will be separated between Business and Residence accounts.

$$\frac{\text{Total Supp. Equip. \& NRC Refund}}{\text{Total Supp. Equip. \& NRC Accum. for all customers}} \times \text{Accum. Amt. Supp. Equip. \& NRC This Customer} = \text{Supp. Equip \& NRC Refund}$$

3. Message Toll Charges

   Each customer will receive an individually computed refund based on the following formula:

$$\frac{\text{Total Toll Refund}}{\text{Total Toll. Accum. for all Customers}} \times \text{Amount Toll This Customer} = \text{Toll Refund}$$

4. Message Unit Charges

$$\frac{4.7 - 4.05}{4.7} \times \text{Total MU Amount This Customer} = \text{MU Refund}$$

Hotels, which had a reduction in the message unit rate, will be excluded from this calculation.

B. Computation of Tax Refunds

1. Local Tax

Refund computation will be as follows:

$$\frac{\text{Local Tax (this Cust.)}}{\text{Total Intrastate Accum. (this Customer)}} \times \text{Total Basic Refundable Amount (this Customer)} = \text{Local Tax Refund}$$

2. Federal Tax

Refund computation will be as follows:

$$\frac{\text{Federal Tax (this Cust.)}}{\text{Total Intrastate Accum. (this Customer)}} \times \text{Total Basic Refundable Amount (this Customer)} = \text{Federal Tax Refund}$$

C. Computation of Interest

Interest at the rate of 7% per annum will be applied to the basic refundable amount (excluding tax). The interest rate formula will use an averaging convention to recognize the accumulation of the basic refundable amount over the period.

D. Application of Refund

1. Current Customers

The refund will be applied as a credit on the customer's bill not more than 120 days after the effective

date of the refund order. The amount will be reflected on the Other Charges and Credits Line of the bill. If there are no other items included on that line that month, the refund credit will be the amount on that line. If there are other items, the refund will appear on the Other Charges and Credits Statement. A printed bill insert will also accompany each refund.

2. Former Customers

Refunds will be calculated as outlined above and, if the refund amount is $1.00 or more, a draft will be mailed to the last known address of the former customer not more than 120 days after the effective date of the refund order. Former customers with an outstanding balance will be credited the refund amount. If the balance resulting is a credit of $1.00 or more, a draft will be prepared and mailed to the former customer. If the account was previously written off as uncollectible, the refund will be credited against the written off amount and a draft will be issued only if a net credit of $1.00 or more results.

3. Coin and Hotel-Motel Guest Customers

These customers may file a claim with the business office for refunds on intrastate toll calls placed from coin telephones or from hotel or motel rooms. These customers will be required to furnish details of calls on which refunds are requested. Claims must be filed within 90 days of the effective date of the refund order.

4. Supersedures

Supersedures involving a closing bill will be handled as a regular final account. Supersedures not involving a closing bill will be treated as continuous service and the refund will be made only to the current account.

5. Refund Adjustments

Any customer who is dissatisfied with his refund may contact the business office for an explanation and will receive an adjustment if warranted.

E. Reporting Requirements

Pacific Telephone will fill a refund report with the Commission within 90 days of completion of the refunds. The report will contain the following information:

1. The total basic refundable amounts plus interest due customers.
2. The estimated refund due coin and hotel-motel guest customers.
3. The total amount credited on bills either initially or through adjustments (Item 5 above).
4. The total amount of refund drafts issued.
5. The total amount of refund drafts returned as undeliverable.
6. The total amount of refund drafts outstanding and an estimate of the portion which will never be presented for payment.

7. The total unrefunded amount (1+2—3—4+5+6) (portion)).

8. The amount of expense incurred in making refunds and accounts charged therewith.

9. Pacific Telephone will also present a proposal for disposal of any moneys due customers but not yet refunded.

APPENDIX B

General Telephone Company of California
Refund Plan

The following procedures will be used to refund increased charges billed as a result of Pacific Company's Decision No. 78851 (rates effective July 23, 1971):

A. Computation of Basic Refundable Amount Per Customer

1. Basic Exchange Charges (C.O. Lines, Trunks and Centrex Mileage)

   Each Customer will be refunded any increased amounts billed (actual amount).

2. Supplemental Equipment and Non-recurring Charges (GTC Tariff Schedule G-21).
   Each customer will be refunded any increased amounts billed (actual amount).

3. Message Toll Charges (Intrastate)
   Each customer will receive an individually computed refund based on the following formula:

$$\frac{\text{Total Toll to be Refunded}}{\text{Total Toll Billed for All Customers}} \times \text{Amount of Toll this Cust.} = \text{Toll Refund}$$

4. Message Unit Charges (actual amount)

   (.047 — .0405) x Total MMU this customer = MMU refund.

   Hotels which had a reduction in the message unit rate will be excluded from this calculation.

5. Total basic refundable amount per customer will be the total of Items 1, 2, 3, 4 and 5.

B. Computation of Tax Refunds

1. Local tax will be computed on individual customer refund using applicable city tax codes (actual amount).

2. Federal tax will be computed on individual customer refund using applicable tax codes (actual amount).

C. Computation of Interest

Interest at the rate of 7% per annum will be applied to the basic refundable amount (excluding tax). The interest rate formula will recognize the accumulation of the basic refundable amount over the period.

D. Application of Refund

1. Current Customers

The refund will be applied as a credit on the customer's bill, not more than 120 days after the effective date of the refund order. The amount will be reflected as a credit adjustment on the bill. Each refundable amount (basic refund, city tax, Federal tax and interest) will appear as a separate entry on the bill. A printed bill insert will also accompany each refund.

2. Former Customers

Customers taken out of service 90 days prior to the refund date will be sent a notice that they may be entitled to a refund as ordered in the decision herein. Customers will be advised to contact the business office to request refunds. Claims must be filed within 90 days of the receipt of the notice.

Former customers whose final accounts are being processed through the billing system as of the refund date will be given a credit.

All refunds will be calculated as outlined above and if the refund amount is $1.00 or more, a check will be mailed to the address supplied by the former customer.

If the balance resulting is a credit of $1.00 or more, a check will be prepared and mailed to the former customer.

3. Coin and Hotel-Motel Guest Customers

These customers may file a claim with the business office for refunds on intrastate toll calls placed from coin telephone or from hotel or motel rooms. These customers will be required to furnish details of calls on which refunds are requested. Claims must be filed within 90 days of the effective date of the refund order.

4. Supersedures

Supersedures involving a closing bill will be handled as a regular final account. Supersedures not involving a closing bill will be treated as continuous service and the refund will be made only to the current account.

5. Refund Adjustments

Any customer who is dissatisfied with his refund may contact the business office for an explanation and will receive an adjustment, if warranted. Claims

must be filed within 90 days of customer's receipt of bill or refund check.

E. Reporting Requirements

General Telephone will file a refund report with the Commission within 90 days of completion of the refunds. The report will contain the following information:

1. The total basic refundable amounts, plus interest due customers.
2. The refund paid coin and hotel-motel guest customers.
3. The total amount credited on bills either initially or through adjustments (Item 5 above).
4. The total amount of refund checks issued.
5. The total amount of refund checks returned as undeliverable.
6. The total amount of refund checks outstanding and an estimate of the portion which will never be presented for payment.
7. The total unrefunded amount (1+2 — 3 — 4+5+6 (portion)).
8. The amount of expense incurred in making refunds and accounts charged therewith.
9. A proposal for disposal of any moneys due customers but not yet refunded.

APPENDIX C

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA REFUND PLAN

The following procedures will be used to refund increased charges billed as a result of Decision No. 78851 (rates effective July 23, 1971):

A. Rate Refund

1. Foreign Exchange Service

   Each customer will be refunded any increased amounts billed.

2. Message Toll Charges

   Each customer will receive an individually computed refund based upon the following formula:

   Total Toll at New Rate — Total Toll at Old Rate = Refund Due*

B. Tax Refund

1. Local Tax

   Refunds will be applied to all customers according to credits due for the classes of service provided.

2. Federal Tax

   Refunds will be applied to all customers according to credits due for the classes of service provided.

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* Should this computation result in an amount due from the customer, the company will not bill the customer for this amount.

C. Computation of Interest

Interest at the rate of 7% per annum will be applied to the basic refundable amount (excluding tax). The interest rate formula will use an averaging convention to recognize the accumulation of the basic refundable amount of the period.

D. Application of Refund

1. Current Customers

The refund will be applied as a credit on the customer's bill not more than 120 days after the effective date of the refund order. The amount will be reflected on the Other Charges and Credits Line of the bill. If there are no other items included on that line that month, the refund credit will be the amount on that line. If there are other items the refund will appear on the Other Charges and Credits Statement. A printed bill insert will also accompany each refund.

2. Former Customers

Refunds will be calculated as outlined above, and if the refund amount is $1.00 or more, a draft will be mailed to the last known address of the former customer not more than 120 days after the effective date of the refund order. Former customers with an outstanding balance will be credited the refund amount. If the balance resulting is a credit of $1.00 or more, a draft will be prepared and mailed to the former customer. If the account was previously written off as uncollectible, the refund will be credited against

the written off amount and a draft will be issued only if a net credit of $1.00 or more results.

3. Coin and Hotel-Motel Guest Customers

Those customers may file a claim with the business office for refunds on intrastate toll calls placed from coin telephones or from hotel or motel rooms. These customers will be required to furnish details of calls on which refunds are requested. Claims must be filed within 90 days of the effective date of the refund order.

4. Supersedures

Supersedures involving a closing bill will be handled as a regular final account. Supersedures not involving a closing bill will be treated as continuous service, and the refund will be made only to the current account.

5. Refund Adjustments

Any customer who is dissatisfied with his refund may contact the business office for an explanation and will receive an adjustment if warranted.

E. Reporting Requirements

Continental Telephone will file a refund report with the Commission within 90 days of completion of the refunds. The report will contain the following information:

1. The total basic refundable amounts plus interest due customers.

2. The estimated refund due coin and hotel-motel guest customers.

3. The total amount credited on bills either initially or through adjustments (Item 5 above).

4. The total amount of refund drafts issued.

5. The total amount of refund drafts returned as undeliverable.

6. The total amount of refund drafts oustanding and an estimate of the portion which will never be presented for payment.

7. The total unrefunded amount (1 + 2 — 3 — 4 + 5 +6 (portion)).

8. The amount of expense incurred in making refunds and accounts charged therewith.

9. Continental Telephone will also present a proposal for disposal of any moneys due customers but not yet refunded.

A. 51774, et al.
D. 80346
D. 80347
D. 80348

COMMISSIONER MORAN, *Concurring.*

I concur in each of these three Pacific Telephone decisions today as they substantially correct the gross errors of law and judgment embodied in this Commission's three previous outrageous decisions[FN] respecting Pacific Telephone (to all three of which I dissented).

It is unfortunate that this Commission has finally recognized its responsibility to the people of California only because the Supreme Court has compelled the Commission to do so. Literally several millions of dollars, not to mention the time of dedicated staff personnel, has been wasted unnecessarily, all at the expense of Pacific Telephone's ratepayers, the taxpayers, and indeed even to the detriment of Pacific Telephone's stockholders.

Dated: August 8, 1972
San Francisco, California

/s/ THOMAS MORAN
Thomas Moran
Commissioner

FN D. 76726, January 27, 1970,
respecting so-called "Western Electric Adjustment",
D. 77987, November 24, 1970,
respecting so-called "accelerated depreciation",
D. 78851, June 21, 1971,
which granted Pacific a rate increase in excess of $143,000,000 per year.

APPENDIX B

Decision No. 81212

BEFORE THE

PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application No. 51774

(Petitions for Rehearing filed August 16 and 17, 1972)

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Case No. 9044

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.

Case No. 9045

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of certain telephone corporations.

OPINION AND ORDER ON REHEARING

By Decision No. 78851 dated June 22, 1971 this Commission authorized The Pacific Telephone and Telegraph Com-

pany (Pacific) to increase its rates by $143,000,000 annually after settlements with the independent telephone companies; the increased rates were effective July 23, 1971. On June 9, 1972 the Supreme Court annulled Decision No. 78851 and directed the Commission as follows:

> "The decision is annulled. The commission is directed to reinstate the rates of its last lawful order preceding the instant proceeding. . . . The commission is further directed to order Pacific to make refunds in accordance with the views expressed herein." (*City of Los Angeles* v. *Public Utilities Commission* (1972) 7 C3d 331, 359.)

In its decision the Supreme Court concluded that "the entire increase of rates collected pursuant to the invalid order must be refunded." (7 C3d at 359.)

Pursuant to what we considered to be the direction of the Supreme Court, we issued Decision No. 80346 dated August 8, 1972 ordering Pacific to make refunds, and ordering all the non-Pacific telephone companies (Independents) in California to make refunds of "all monies collected over and above Pacific's rate levels affecting [the Independents] in effect prior to July 23, 1971," less certain rate increments. Decision No. 80346 also established refund plans for the Independents.

The Independents petitioned for a rehearing of Decision No. 80346 on the ground that the decision was erroneous and invalid insofar as it orders refunds by the Independents because the decision in *City of Los Angeles*, supra, neither requires nor justifies the order of the Commission, and the Commission is without authority to order the Independents to refund. The petition for rehearing

was granted and the order requiring refunds was stayed. (Decision No. 80487 dated September 12, 1972.) Rehearing was held on December 1, 1972 in San Francisco before Examiner Robert Barnett and the matter was submitted subject to the filing of briefs.

The position of the Independents is that no refunds are required; the position of the city of Los Angeles and the staff is that total refunds are required as ordered by Decision No. 80346; Pacific takes no position. The amount in controversy is approximtaely $10,300,000: $4,100,000 in toll revenue and $6,200,000 in multi-message unit (MMU) revenue.

Background

Telephone service in California is provided by Pacific and 28 non-Pacific telephone companies. These 28 companies are known collectively as the Independents; they range in size from the very small Bryan Telephone Company with gross annual revenues of approximately $20,000 to the very large General Telephone Company with gross annual revenues of approximately $500,000,000. Pacific's gross annual revenue is approximately $2,000,000,000.

Toll charges in California are computed on a mileage basis. To insure uniformity of charges throughout the State no matter which telephone company, or companies, is involved in a particular call, rates per mile are the same for all companies. The Commission has chosen Pacific to be the rate setting utility. By Decision No. 74917 dated November 6, 1968 in Application No. 49142 the Commission ordered all independent telephone companies to file with the Commission a concurrence in the message toll telephone tariffs of Pacific. That concurrence states:

(*Independent Telephone Company*) assents to, adopts, and concurs in the tariffs of The Pacific Telephone and Telegraph Company listed below, together with amendments thereto and successive issues thereof, and hereby makes itself a party thereto until this authority is revoked by cancellation of this adoption notice, for the purpose of furnishing all intrastate message toll telephone service thereunder originated at or terminated at a point of this Company.

1. Schedule Cal. P.U.C. No. 53-T, Message Toll Telephone Service—Rates and Conditions.
2. Schedule Cal. P.U.C. No. 89-T, Message Toll Telephone Service—Toll Rate Guide General Rate Regulations.
3. Schedule Cal. P.U.C. No. 90-T, Message Toll Telephone Service—Toll Rate Guide for the State of California.
4. Schedule Cal. P.U.C. No. 92-T, Message Toll Telephone Service—Supplement to Toll Rate Guide for the State of California.

In order to have an equitable division of all toll revenue, rather than have each company retain the toll that its subscriber is liable for, all of the Independents and Pacific have entered into settlement contracts for interchanged message toll traffic between the companies. These settlement contracts were in force during all times germane to this proceeding; they are on file with the Commission.

The settlement contracts established procedures by which each company is compensated for its costs of providing interchanged service. Reduced to their essence, these

procedures provide that all the revenues of all companies from interchanged traffic are credited to Pacific. Each independent company then computes its cost of handling interchanged traffic, including a return equal to Pacific's return for such traffic. This establishes the settlement payment due to each independent company out of these total revenues. Pacific, in turn, calculates its return by deducting the total of all such settlement payments from the total of all revenues derived by all companies from interchanged traffic and applying the difference to Pacific's investment related to that traffic. In practice the initial computations are necessarily based upon an estimated rate of return for Pacific. When the actual return is later determined, the contracts provide for adjustment of settlement payments.

If any company's revenues attributable to the traffic being settled for are diminished, the total of all revenues is necessarily reduced. The effect is to reduce Pacific's return for settlement purposes, which causes a reduction in the independent company's costs and hence a reduction in settlement payments to the Independents. Thus, any order which requires refunds from all companies, or only from Pacific, will have an impact on settlement payments.

In addition to intercompany toll settlements Pacific has joint multi-message unit rates with General Telephone Company. The rate is set by Pacific and concurred in by General and revenues are settled between the two companies in the same manner as toll revenues.

When Pacific's toll rate schedule is authorized and when its multi-message unit rate is authorized, these rates are primarily based upon Pacific's revenue requirements and Commission policy regarding the spread of rates between classifications, not the revenue requirements of any or all

independent telephone companies. Because of the concurrence of the Independents in Pacific's rates, the revenue of each independent company is affected, quite often substantially, but without relationship to the needs of the independent company.

On March 17, 1970 Pacific filed Application No. 51774 seeking an increase in annual revenues of approximately $195,000,000. Included in the rates sought to be increased were the rates for intrastate toll and interexchanged multi-message units. On April 7, 1970 the Commission instituted Case No. 9045 to investigate the operations of all telephone utilities in the State. Case No. 9045, among other things, investigated the separation procedures affecting the toll settlements of Pacific and other California telephone utilities, and the multi-message unit rates of Pacific in the Los Angeles extended area relating to General Telephone. All independent telephone companies in California were served as respondents in Case No. 9045, and Case No. 9045 was consolidated for hearing with Application No. 51774.

Decision No. 78851 issued as a result of the consolidated hearings. The following finding from that decision is pertinent to this case:

> 11. An increase of $143,000,000 in gross annual revenues, *after settlements with independent telephone companies* and based upon the test year 1970, is justified. (Emphasis added.)

The effect of Decision No. 78851 on telephone rates in California was to authorize an increase in rates, including toll and MMU, filed by Pacific which would net Pacific $143,000,000, on a test year basis, after settlements with the Independents. The actual toll and MMU rates authorized were expected to produce about $10,000,000, on a test

year basis, more than was necessary to meet Pacific's requirements. In accord with their concurrences all Independents raised their rates, effective concurrently with Pacific's raises.

Various parties sought review of Decision No. 78851 and petitioned the Supreme Court to stay the order. On July 21, 1971 the Supreme Court granted a stay as follows: ". . . the petitions for stay are granted in part as follows: All sums collected by Pacific Telephone and Telegraph Company, the Real Party in Interest, pursuant to the rates authorized by Decision No. 78851 shall be subject to refund in whole or in part upon order of this court should Decision 77984[1] or 78851 be annulled or modified by this court." Both decisions were annulled in their entirety.

Discussion

The Independents argue that the *City of Los Angeles* decision neither requires nor justifies refunds by the independent telephone companies. They argue that Decision No. 78851 authorized rates estimated to produce $143,000,000 additional revenue to Pacific; that petitions for rehearing of Decision No. 78851 did not dispute the revenues authorized for the Independents through their concurrences; and that on appeal the Supreme Court only considered the $143,000,000 revenue increase to Pacific. They argue that when a rate increase has been authorized by the Commission after hearing the revenues collected thereunder belong to the utility and may not be ordered refunded even though the rate order is subsequently annulled unless a stay has been issued.

[1] Decision No. 77984 was annulled by the Supreme Court in *City and County of San Francisco* v. *Public Utilities Commission* (1972) 6 C 3d 119.

The Independents assert that "whether or not the Court had in mind the Commission practice of fixing uniform toll and MMU rates for both the independents and Pacific in Pacific rate proceedings at a level sufficient to yield a reasonable return upon the aggregate investment in the integrated statewide network of facilities involved in these services . . . does not appear from the decision. In either event it is manifest that by directing only that Pacific be required to make refunds the Court could not have intended to direct refunds by the independents." They conclude by stating that this Commission has no authority to order the Independents to refund under the circumstances.

The argument of the Independents is without merit. First, we need not decide whether we have authority to order refunds independently of the Supreme Court's refund order. Our order in this proceeding is in obedience to the Supreme Court's statement that "the entire increase of rates collected pursuant to the invalid order must be refunded." (*City of Los Angeles* v. *Public Utilities Comm.* (1972) 7 C3d 331, 359.) Second, Decision No. 78851 did not only find that Pacific required $143,000,000 of additional revenues, it also set rates that would yield those revenues and millions of dollars more. It was the rates that were set that were under attack both in the petitions for rehearing and in the subsequent appeal from the Commission's order after rehearing was denied. Third, in neither the petition for rehearing nor the appeal was there need to mention, as separate issues, the additional toll revenues authorized for the Independents or the added MMU revenue authorized for General, because the toll rate and the MMU rate, from which those revenues were to be derived, were integral parts of the rate increase granted to Pacific. A challenge to the total rate is a challenge to its component

parts. Fourth, although the Court directed the Commission to order Pacific to make refunds, and did not mention the Independents by name, other portions of the Court's opinion make it abundantly clear that the Court expected all increased rates collected pursuant to Decision No. 78851 to be refunded. The Court said "we conclude that the *entire increase of rates* collected pursuant to the invalid order must be refunded." (Emphasis added, 7 C3d at 359.) The invalid order is the order in Decision No. 78851. Ordering Paragraph 2 of that order authorized Pacific to file the revised rate schedules attached as Appendix B. Appendix B included the increases in toll and multi-message unit rates. In the same paragraph of its opinion the Court repeated itself by stating "insofar as the rates which went into effect on May 27 reflect increases based on the invalid order before us, refunds are necessary." (7 C3d at 359.) The Supreme Court order is clear and direct. It annulled our decision, it invalidated our order, and it concluded that the entire increase of rates must be refunded.

The Independents admit that toll rates and MMU rates are fixed as part of a proceeding involving all of the rates of Pacific but argue that the establishment of such rates to all intents and purposes is treated as a separate and distinct matter. This just isn't true. An examination of the rates authorized to Pacific in Appendix B in Decision No. 78851 does not show that the rates concurred in by the Independents are treated as a separate and distinct matter, except to the extent that toll and MMU rates are separate and distinct from business, residence, and other rates.[3]

[3] There is some discussion in the opinion portion of Decision No. 78851 of toll and MMU rates, but there is no separation between Pacific and the Independents in the rates that were increased, and it is the entire increase of rates that was annulled and must be refunded.

Further, the Independents admit that when the Supreme Court annulled Decision No. 78851 and the rates set for Pacific, that the toll and MMU rates for the Independents for the future were also annulled. The Independents do not claim that the Decision No. 78851 rates are still valid as to them; they just don't wish to be required to refund the amounts collected pursuant to the invalid order.

The Independents made no showing of revenue requirements. They admit that "the revenue impact of the rates so established [in a Pacific proceeding] upon the results of operation of any independent company can, as a matter of regulatory necessity and expediency, be considered only in a rate proceeding involving that particular company. Otherwise every Pacific rate case would require a full-blown rate case of each and every independent that has settlement arrangements with Pacific and the policy of uniform rates would be impossible of accomplishment." This quotation supports arguments in favor of a refund by the Independents. Toll and MMU rates were set in Pacific's proceeding which was appealed and which was annulled. If toll and MMU rates were set in a separate proceeding, or if they were set in proceedings involving individual independent companies, then the decisions in those separate cases could have been appealed. Regarding toll and MMU rates there was one order, one appeal, and one reversal.

The principal argument of the Independents to retain the monies collected pursuant to the invalid rates is that Decision No. 78851 was not stayed as to the Independents. Neither the Commission nor the Supreme Court directed a stay order to the Independents. They cite *Pacific Tel and Tel Co.* v. *Public Utilities Commission* (1965) 62 C2d

634, 652 for the statement that: "In at least two cases it has been held that a utility whose rates had been commission approved could not be compelled to make refunds of new and increased rates collected under a commission order set aside on appeal, where the order had not been stayed."

The two cases referred to in the quotation were *Mandel Bros. Inc.* v. *Chicago Tunnel Terminal Co.* (1954) 2 Ill 2d 205, 177 N E 2d 774, and *Keco Industries, Inc.* v. *Cincinnati & Suburban Bell Tel Co.* (1957) 166 Ohio St 254, 14 N E 2d 465.

The quotation from *Pacific Tel and Tel Co.* v. *PUC*, 62 C 2d 634, 652 is not in point because the Independents are not "a utility whose rates had been commission approved." It was Pacific's rates that were commission approved. Neither *Keco* nor *Mandel* involved rate increases instituted automatically based upon the adoption of tariffs of another utility.

The Independents cite *Southern Bell Tel and Tel Co.* v. *Louisiana Public Service Commission* (1961) 242 La 24, 134 So 2d 61, 42 PUR 3d 39, in support of their position. The Independents argue that in the *Southern Bell* case the Louisiana Commission "had ordered refunds of 20 percent of Southern Bell's charges for intrastate toll for a stated period of time. In subsequent proceedings it was made clear by the Commission and affirmed by the Court, with respect to traffic interchanged with Independents, that the refund would be comprised only of 20 percent of Southern Bell's revenues even though refunds were made to customers of independent companies. The revenues received by the independent companies were not required to be refunded." Los Angeles and the staff argue that the Independents have misinterpreted the *Southern Bell* case and that, in fact, the case supports the California Com-

mission's order requiring the Independents to make refunds. We agree with the staff and Los Angeles.

In *Southern Bell* the Louisiana Commission ordered Southern Bell to reduce its annual gross intrastate operating revenues and to accomplish that, ordered that "all intrastate toll rates and charges [of Southern Bell] shall be subject to a discount of 20 percent per call." That order was appealed and sustained on appeal. Southern Bell then proceeded to make refunds on monies collected during the time the order was on appeal. On further investigation the Commission found that Southern Bell had made refunds on intrastate toll messages utilizing joint facilities with independent companies where such messages originate in a Southern Bell exchange as a "sent paid" message or terminate as a "received collect" message, but had not made refunds on intrastate toll messages originating in an exchange of an Independent connecting company on a "sent paid" basis or terminating there on a "received collect" basis. The Commission ordered Southern Bell to refund 20 percent of all toll charges collected by the Independents for use of Southern Bell facilities. Southern Bell appealed.

The Louisiana Supreme Court affirmed and stated "It seems quite evident from the plain language of the order that the commission did order and did contemplate that 'all intrastate toll rates and charges' of Southern Bell were subject to the discount of 20 percent, and that the order was intended to effect a reduction in toll rates collected by independent connecting companies for the account of Southern Bell. . . . If it can increase its charges with customers with whom it has no customer relations [by joint toll rates] it can also reduce its charges with those customers." (42 PUR 3d at 45.)

Southern Bell is distinguishable on its facts from the case at bar because the order directed Southern Bell to make refunds of monies paid by Independent telephone customers to Independent companies for telephone messages originating in Independent territory travelling over joint facilities.

From our understanding of settlement contracts it appears that when Southern Bell made the 20 percent refund to the Independent customers the refund would trigger a recomputation of settlement funds and necessarily a lessening of revenue to the Independents. If we were to follow the theory of *Southern Bell* and order Pacific to make refunds to Independent customers the Independents' revenue would be reduced just as much as if we were to order the Independents to make refunds directly.[3] From the ratepayer's point of view *Southern Bell* supports the proposition that to prevent discrimination and to maintain uniformity in intrastate toll rates when intrastate toll rates are reduced for one company (Bell) then the comparable rates for another company (the Independents) shall also be reduced for interexchanged traffic. That is the practical result of the case at bar and that is why we feel that *Southern Bell* supports our action.

To hold for the Independents would create discrimination among customers. During the refund period an In-

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[3] A witness for the Independents explained the toll settlements as follows: the Independents "turn over . . . all intrastate toll revenue that they collect from their customers to Pacific Telephone. In turn Pacific Telephone pays the Independents' operating cost plus a settlement rate of return on the plant assigned to the intrastate toll operation. . . ." Under these facts there seems no reason why we could not order Pacific to make the refunds to the customers of the Independents, as was done in *Southern Bell*.

dependent customer would have had to pay more for a telephone message between points in California and between telephone companies in California than a Pacific subscriber. And to hold for the Independents would violate the Commission policy to maintain uniformity of intrastate toll rates between all points and between all telephone companies.

The argument of the Independents comes down to this: If the Supreme Court had included the words "and the Independents" after the word "Pacific" in its stay order the Independents would refund $10.3 million; since the Supreme Court did not, the Independents will not. This argument has much the flavor of magic words; rate regulation should be based on a more substantial rationale than the turn of a phrase. In any event, it was Pacific's toll and MMU rates that were appealed, it was Pacific's toll and MMU rates that were stayed, it was Pacific's toll and MMU rates that were annulled, and it was Pacific's toll and MMU rates in which the Independents concurred. If the rates are considered to be those of the Independents the rates were challenged on appeal, they were annulled, and "the entire increase of rates collected pursuant to the invalid order must be refunded." The Independents sought to obtain the benefits from the rates; they must now bear the burdens.

ORDER

IT IS ORDERED that:

1. Decision No. 80346 is affirmed.

2. The stay granted by Decision No. 80487 is dissolved.

3. The computation of time for the independent telephone companies or their customers to do any act required by Decision No. 80346 shall be computed from the effective date of this order.

The effective date of this order is the date hereof.

Dated at Los Angeles, California, this 27th day of March, 1973.

Certified as a True Copy

ERVIN C. KINSEY, JR.
Assistant Secretary
Public Utilities Commission
State of California

VERNON L. STURGEON
President

WILLIAM SYMONS, JR.

J. P. VUKASIN, JR.

THOMAS MORAN

D. W. HOLMES
Commissioners

Order Denying Writ of Review

S.F. No. 23009

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, ETC., ET AL.

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.

Sullivan, *J.*, did not participate.

Petition for writ of review DENIED.

SUPREME COURT
FILED
SEP 6 1973
G. E. BISHEL, *Clerk*

Illegible
Deputy

BURKE
Acting Chief Justice

Order of California Supreme Court Granting Partial Stay

S.F. No. 22828
S.F. No. 22794

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BENNETT, ETC. ET AL.,

Petitioners,

v.

PUBLIC UTILITIES COMMISSION ETC.;
PACIFIC TELEPHONE AND TELEGRAPH, Real Party in Interest.

CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

PUBLIC UTILITIES COMMISSION ETC. ET AL.

Sullivan, *J.*, did not participate.

It appearing from the specific facts shown by the verified petitions for stay and the verified affidavits filed in support thereof that irreparable damage will otherwise result, the petitions for stay are granted in part as follows: All sums collected by Pacific Telephone and Telegraph Company, the Real Party in Interest, pursuant to the rates authorized by Decision 78851 shall be subject to refund in whole or

in part upon order of this court should Decisions 77984 or 78851 be annulled or modified by this court.

Since the Real Party in Interest has consented to such an order, there is no need to file a bond or hold hearings pursuant to sections 1762 et seq. of the Public Utilities Code.

In all other respects the petitions for stay are denied.

WRIGHT
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 27th day of November A.D. 1973.

Clerk
By (Illegible)
Deputy Clerk

FILED
JUL 21 1971
G. E. BISHEL, Clerk
(Illegible)
S. F. Deputy

Order Continuing Stay

Decision No. 82014

BEFORE THE

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application No. 51774

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Case No. 9044

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.

Case No. 9045

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of certain telephone corporations.

In Decision No. 80346, dated August 8, 1972 we ordered, among other things, that General Telephone Company of California (General), Continental Telephone Company of

California (Continental) and all other independent telephone companies make certain refunds. This order requiring refunds was stayed by Decision No. 80487, dated September 12, 1972, pending rehearing of Decision No. 80346.

On March 27, 1973, in Decision No. 81212, we affirmed Decision No. 80346 and dissolved the stay granted by Decision No. 80487. On May 8, 1973 Decision No. 81367 was issued which granted the independent telephone companies a stay of Decision No. 81212 and Ordering Paragraphs 3, 4 and 5 of Decision No. 80346 pending determination of a petition to the California Supreme Court for a writ of review.

On September 20, 1973, California Independent Telephone Association, General Telephone Company of California and Continental Telephone Company of California petitioned us for a continuation of the stay issued in Decision No. 81367 pending a determination of their case by the United States Supreme Court. The Commission being of the opinion that good cause exists for continuing the stay granted in Decision No. 81367;

THEREFORE, IT IS ORDERED that the stay granted in Decision No. 81367 is hereby continued until further order of the Commission.

Dated at Los Angeles, California, this 16th day of October, 1973.

VERNON L. STURGEON
President

WILLIAMS SYMONS, JR.

THOMAS MORAN
Commissioners

Order Continuing Stay

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a True Copy

ERVIN C. KINSEY, JR.
Assistant Secretary
Public Utilities Commission
State of California

Excerpts From California Public Utilities Commission Decision No. 78851

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application No. 51774
(Filed March 17, 1970)

In the matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Case No. 9036
(Filed April 13, 1970)

WILLIAM M. BENNETT, Consumer Spokesman, and Consumers Arise Now, an association,

Complainants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

Excerpts From California Public Utilities Commission Decision No. 78851

Case No. 9042
(Filed April 2, 1970)

144 Spanish-Speaking Telephone Subscribers From San Francisco, Sonoma, and Imperial Counties, The Spanish-Speaking/Surnamed Political Association, The Mexican-American Political Association, The Healdsburg and Windsor Local Action Councils,

Complainants and (Proposed) Protestants,

vs.

The Pacific Telephone and Telegraph Company, a corporation,

Defendant and Applicant in Proposed Rates Increase #51774

Case No. 9043
(Filed April 6, 1970)

William M. Bennett, Consumer Spokesman, and Consumers Arise Now, an association,

Complainants,

vs.

Western Electric Company, joining Pacific Telephone and Telegraph Company and American Telephone and Telegraph Company as Interested Parties,

Defendants.

Excerpts From California Public Utilities Commission Decision No. 78851

Case No. 9044
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.

Case No. 9045
(Filed April 7, 1970)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of all the telephone corporations listed in Appendix A, attached hereto.

. . . .

Findings and Conclusions

The Commission finds that:

1. After due notice, public hearings have been held on a record consolidating Application No. 51774 and Cases Nos. 9036, 9042, 9043, 9044 and 9045; evidence has been adduced; the Commission has been fully informed and, except for the "data exchange service" phase of Cases Nos. 9044 and 9045, the matters stand submitted.

2. This Commission last exhaustively analyzed the operations of Pacific in Application No. 49142. Decision No. 74917 was issued therein on November 6, 1968, and the rates

therein prescribed (those presently in effect, with minor exceptions) became effective in December 1968.

3. Plant additions of at least $750,000,000 per year by Pacific for the next three years will decrease the likelihood of service problems.

4. Under existing rates and charges for its utility services, Pacific's earnings for the test year 1970 produce a rate of return of 5.80 percent on an intrastate rate base of $3,540,600,000.

5. The adopted estimates in Table II of the foregoing opinion, as discussed in that opinion, of operating revenues, operating expenses and rate base for the test year 1970 reasonably indicate the probable results of Pacific's operations for the near future at the present wage levels of Pacific's employees.

6. Western Electric Company, Inc. (Western) in the performance of its manufacturing functions and service and supply functions, has charged prices to Pacific and obtained earnings on sales and services to Pacific which have been fair and reasonable when compared to the earnings of manufacturing companies. The prices paid by Pacific to Western for manufactured products and for services and supplies have been fair and reasonable, but we shall continue to review prices paid in the future, to be sure they continue to be fair and reasonable.

7. No showing has been made that Western is a public utility under the jurisdiction of this Commission.

Excerpts From California Public Utilities Commission Decision No. 78851

8. A rate of return of 7.85 percent on a test year intrastate rate base of $3,540,600,000 and a corresponding return of 9.5 percent on common equity are reasonable.

9. Pacific is in need of additional revenues, but the increases it requests would be excessive.

10. Pacific is entitled to increases of 73 million dollars in net intrastate annual revenues to raise its test year rate of return from the present 5.80 percent to the 7.85 percent hereinabove found to be reasonable.

11. An increase of 143 million dollars in gross annual revenues, after settlements with independent telephone companies and based upon the test year 1970, is justified.

12. Based upon the record herein, the increases in rates and charges authorized herein are justified; the rates and charges authorized herein are reasonable; and the present rates and charges, insofar as they differ from those prescribed herein, are for the future unjust and unreasonable.

13. If, as a result of the pending review of Interim Decision No. 77984 by the California Supreme Court, these proceedings are reopened and lower revised rates are authorized, it will be reasonable for Pacific to refund to its customers any difference between the amounts charged in the interim and the amounts that would have been charged at the rates authorized in the reopened proceedings.

14. The staff recommendations in Chapters 6 and 7 of Exhibit No. 69 warrant further investigation and feasibility studies.

Excerpts From California Public Utilities Commission Decision No. 78851

15. Steps taken by Pacific to assist subscribers who do not speak English have been reasonable.

The Commission concludes that:

1. Pacific should be required to install at least $750,000,000 of plant addition per year for the next three years.

2. Pacific's application for rate increases should be denied in part and granted in part.

3. Pacific should be required to prepare feasibility studies on the staff suggestions in Chapters 6 and 7 of Exhibit No. 69.

ORDER

IT IS ORDERED that:

1. During each of the years 1971, 1972 and 1973, The Pacific Telephone and Telegraph Company (Pacific) shall install at least $750,000,000 of plant additions.

2. After the effective date of this order, Pacific is authorized to file the revised rate schedules attached to this order as Appendix B and, concurrently, to cancel or modify its present tariffs to make them consistent therewith. Such filing shall comply with General Order No. 96-A. The effective date of the revised schedules shall be ten days after the date of filing. The revised schedules shall apply only to service rendered on and after the effective date thereof.

3. The filing by Pacific of the revised rate schedules authorized herein shall constitute acceptance by Pacific of the requirement that if, as a result of the pending review of Interim Decision No. 77984 by the California Supreme

Excerpts From California Public Utilities Commission Decision No. 78851

Court, these proceedings are reopened and lower revised rates are authorized, Pacific must refund to its customers, under a plan acceptable to this Commission, any difference between the amounts charged in the interim and the amounts that would have been charged at the rates authorized in the reopened proceedings. In order promptly to effect the refunds which would be required under those circumstances, Pacific shall maintain records of intrastate charges to each of its customers (excluding coin box collections) beginning with the effective date of the rates authorized herein and continuing until further order of this Commission.

4. After the effective date of this order, each respondent in Case No. 9045 is authorized to file foreign exchange service tariffs consistent with the revised basic exchange rates of Pacific, as set forth in Appendix B of this order and, concurrently, to cancel or modify its present tariffs to make them consistent therewith. Such filing shall comply with General Order No. 96-A. The effective date of the revised schedules shall be ten days after the date of filing.

5. Within six months after the effective date of this order, Pacific shall file in these proceedings detailed feasibility studies showing advantages, disadvantages, effects, costs and plant investment required to effect each of the staff recommendations set forth in Chapters 6 and 7 of Exhibit No. 69 not disposed of by this decision.

6. Except to the extent that relief has been granted by this order, Cases Nos. 9036, 9042 and 9043 are dismissed.

7. Except for the "Data Exchange Service" phase of Cases Nos. 9044 and 9045, those investigations are discontinued.

Excerpts From California Public Utilities Commission Decision No. 78851

8. Motions consistent with the opinion and order herein are granted; those inconsistent therewith are denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 22nd day of June, 1971.

J. P. VUKASIN, JR.
Chairman

WILLIAM SYMONS, JR.
VERNON L. STURGEON
D. W. HOLMES
Commissioners

I concur in part and
dissent in part.

/s/ THOMAS MORAN
(see attached)

. . . .

SUPREME COURT OF
JAN 7

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondents in Opposition

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Dated: January 4, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondents in Opposition

OPINIONS BELOW

The opinions of the California Public Utilities Commission (Commission), not yet reported, appear in the Appendix to the Petition (Pet. App. 125a-147a, 148a-162a). No opinion was rendered by the California Supreme Court. Instead, an order denying a petition for writ of review was issued September 6, 1973 (Pet. App. 163a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Is a public utility deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when it is required to refund revenues collected pursuant to a rate order set aside on review by the California Supreme Court and where said rate order was the subject of a partial stay order issued by that court?

CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Fourteenth Amendment, United States Constitution is set forth in the Petition at p. 2.

STATEMENT

1. Nature of the Subject Matter in Issue.

This litigation concerns the refundability of revenues collected pursuant to a rate order subsequently overturned by the California Supreme Court. The uniqueness of the present controversy stems from Petitioners' peculiar status in the underlying proceeding which gave rise to the instant controversy.

In California rates for intrastate toll service (toll rates) and multi-message unit service (MMU rates) are established in a general rate proceeding of The Pacific Telephone and Telegraph Company (Pacific).[1] All independent telephone companies in California are made parties to the Pacific proceeding and required to adopt the toll and MMU rates authorized therein.

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1. MMU rates apply only to Pacific and General Telephone Company of California (General).

The toll and MMU rates so established are based primarily upon the revenue requirements of Pacific and not upon the revenue requirements of Petitioners. Under this procedure all toll and MMU rates throughout California are uniform regardless of the telephone company with which a particular call may originate or terminate.

However, each company does not simply retain the toll and interchanged MMU revenues collected from its respective subscribers. Under settlement contracts entered into between Pacific and Petitioners and filed with the Commission, the total applicable revenues from all companies for toll and interchanged MMU service are pooled and, after expenses are determined and offset, the net revenues are distributed to each of the involved companies in an amount proportionate to the amount of telephone plant used by each participating company in toll or interchanged MMU service. Thus, there is no direct correlation between the rates a particular company may assess its subscribers and the revenues it may eventually receive after settlement.

2. The Proceedings Below.

On June 22, 1971 the Commission authorized Pacific to increase its rates for telephone service (*Pacific Tel. & Tel. Co.* (1971) 72 Cal.P.U.C. 327, 90 P.U.R. 3d 172). This authorization, under which the increases were to become effective July 23, 1971, was also the vehicle whereby Petitioners increased their rates for toll service and multimessage unit service.

However, prior to the rates becoming effective, the California Supreme Court issued a partial stay on July 21, 1971, wherein it was provided in part that:

> "All sums collected by Pacific . . . pursuant to the rates authorized by Decision No. 78851 shall be subject to refund in whole or in part upon order of this court should decision 77984 or 78851 be annulled by this court." (See Pet. App., 164a-165a.)

On July 9, 1972 Commission Decision No. 78851 was annulled by the California Supreme Court (*City of Los Angeles v. Public Util. Com.* (1972) 7 Cal. 3d 331, 497 P.2d 785). In its opinion the court stated:

> ". . . the entire increase of rates collected pursuant to the invalid order must be refunded." (7 Cal. 3d at 359.)

In compliance with this direction, the Commission issued Decision No. 80346 on August 8, 1972 (Pet. App. 125a-147a). Pacific and Petitioners were therein ordered to refund revenues collected over those rate levels in effect prior to July 23, 1971, less certain rate increments.[2] Pacific has made the required refunds.

Petitioners filed for a rehearing and stay of Decision No. 80346 on August 16 and 17, 1972 (Pet. App. 53a-90a). These petitions were granted by the Commission in Decision No. 80487 issued September 12, 1972 (App. 1). Rehearing was held on December 1, 1972. Thereafter, on March 27, 1973 the Commission issued Decision No. 81212 (Pet. App. 148a-162a) affirming Decision No. 80346 and dissolving the stay granted in Decision No. 80487.

A petition for writ of review before the California Supreme Court was filed by the Petitioners herein on April 26, 1973 (Pet. App. 91a-124a). On May 8, 1973 the Commission issued Decision No. 81367 which order stayed the refund provisions of the previous decisions as they applied to Petitioners (App. 5).

On September 6, 1973 the court below denied the petition for writ of review. In response to a request by Petitioners, the Commission continued the stay granted in Decision No. 81367 by Decision No. 82014 dated October 16, 1973 (Pet. App. 166a).

---

2. By companion orders issued the same date, the Commission authorized a rate increase of $55.4 million to Pacific and restated increases authorized in other decisions. These decisions included toll and MMU rates within those rates authorized to be increased.

ARGUMENT

It is essential to a proper understanding of the instant controversy that recognition be made of the distinction between (1) the toll and MMU *rates* charged by a particular telephone company and (2) the *revenue* ultimately received by that utility after settlement. It is this distinction that evidences the error of Petitioners' assertion that they are entitled to the revenues ordered by the Commission to be refunded.

1. The Commission's Refund Order Directed to Petitioners Does Not Constitute Retroactive Ratemaking.

Petitioners allege that they cannot be legally required to refund revenues collected pursuant to a rate order that was not stayed (Pet., 9-12). Said to support this challenge to the orders of the Commission and the court below are two United States Supreme Court decisions and several state court opinions.

The cases cited by Petitioners may be accepted as law but they are of no aid to the goal sought in the instant petition. Indeed, the California Supreme Court has determined, although not on constitutional grounds, that the Commission may not retroactively fix rates (*Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634, 650, 401 P.2d 353; see also *City of Los Angeles v. Public Util. Com., supra* (1972) 7 Cal.3d 331, 357, 497 P.2d 785). It necessarily follows therefrom that the court below did not consider the present matter as involving retroactive ratemaking when it declined to review the subject Commission decision.

None of the cases cited by Petitioners involved the situation present herein where the revenues in question were collected through concurrences in the rates of another utility which rates were admittedly made subject to refund. Thus,

in *Board of Pub. Util. Comrs. v. New York Teleph. Co.* (1926) 271 U.S. 23, 70 L.Ed. 808, the issue was whether accumulations from past operations can be used to validate otherwise confiscatory rates for the future. The constitutional protection applicable in that controversy was described by this Court as follows:

> "The just compensation safeguarded to the utility by the 14th Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. [citations]." (271 U.S. at 31.)

Consequently, it was concluded that:

> ". . . Profits of the past cannot be used to sustain confiscatory rates for the future." (271 U.S. at 32.)

In the controversy now at hand the proceeding giving rise to the revenues claimed by Petitioners to be nonrefundable was based on the revenue requirements of Pacific. Petitioners' revenue requirements were not considered when the subject rates were authorized. Nor were they considered when the rates were annulled. They have never been an issue in the underlying proceedings concerning the toll and MMU rates.

Therefore, and contrary to the situation in *Board of Pub. Util. Comrs. v. New York Teleph. Co., supra,* the instant matter does not make use of Petitioners' past accumulations to support the subject refund order. Rather, the refund order was initiated simply because the basis for the increase was determined to have been deficient. It would indeed be anomalous if Petitioners can now retain revenues, the support for which was based on the revenue requirements of Pacific, when Pacific was under an unquestionable legal obligation to refund.

In the second of Petitioners' cited Supreme Court cases, *Arizona Grocery Co. v. Atchison, T.&S.F.R. Co.* (1932) 284 U.S. 370, 76 L.Ed. 348, the issue was whether the Interstate Commerce Commission could legislatively set rates for the future and, subsequently, judicially award reparations which, in effect, repealed its own action with retroactive effect. That situation is, of course, not present herein.

In the present controversy, the Commission did not repeal its own prior decision. Rather, it was the California Supreme Court, acting properly within its powers, that determined that the rates authorized by the Commission must be set aside. Furthermore, the Court provided beforehand that the revenues collected pursuant to the challenged rates be made subject to refund.

Petitioners are in error in asserting that the "impoundment-for-refund" order was directed only at Pacific. Understanding the nature of the monies involved, it is inescapable that the stay order issued by the Court below can only be reasonably interpreted to apply to all revenues received pursuant to the annulled decision.

As indicated hereinabove, the revenues received by Petitioners after settlement have no direct relationship to the rates Petitioners assessed against their subscribers. Notwithstanding Petitioners' argument (Pet., 11), it is not only Petitioners' filed concurrences in the rates of Pacific but the settlement contracts as well that support and justify the Commission action taken in requiring refunds. Furthermore, as previously indicated, the underlying support for the monies now required to be refunded was the revenue requirement of Pacific, and not Petitioners.

Thus, the Commission respectfully submits that the toll and MMU rates and revenues of Pacific and Petitioners

cannot logically or rationally be separated and treated differently. In light of this relationship there is simply no reasonable way in which to construe the subject stay order as limited to Pacific.

2. The Commission's Refund Order Directed to Petitioners Does Not Unconstitutionally Confiscate Revenues.

Petitioners claim that the effect of the Commission's refund order on their local exchange rates amounts to confiscation (Pet., 12-13). Thus, it is argued that the Commission itself relied upon the revenue to be derived from toll and MMU services in setting local exchange rates for the Independents after June 22, 1971.

Initially, the Commission will not disagree with the claim of Commission reliance for the purpose of this filing. It is, however, pointed out that of the twenty-eight independent telephone companies in California, only General was granted rate relief by the Commission between June 22, 1971 and August 8, 1972, the dates between which the subject rates were authorized and ordered to be refunded (*Appl. of Gen. Tel. Co.* (1971) 72 Cal.P.U.C. 652, 92 P.U.R. 3d 224).

The rate increase authorized General was issued November 22, 1971 with the rates to become effective no earlier than twenty days thereafter. Therefore, to the extent there was Commission reliance on the subject toll and MMU revenues in "other" proceedings, it was limited to one company and for a limited period of time.

Furthermore, Petitioners' attempt to insert the impact of the Commission's refund order upon their local exchange rates amounts to raising a matter that was not before the Commission when the subject rates were authorized or the court below when the subject rates were annulled. Thus,

the Commission submits that Petitioners' local exchange rates are not properly before this Honorable Court now.

Finally, it is pointed out that any refund obligation, including Pacific's, operates to trigger a recalculation of the total revenues to be received under the settlement contracts (Pet. App. 152a). If Pacific is the only company that must refund, still, there will be a corresponding reduction in the total revenues to be shared by all telephone companies in California. Consequently, while the magnitude of the impact of the refund obligations may vary depending on what parties are required to refund, an impact on Petitioners' earnings results whether they refund or not.

3. The Instant Controversy Turns on Its Own Facts.

Petitioners have cited no authority that is in direct conflict with the action taken by the Commission and the Court below. Petitioners have referred to no pending litigation wherein similar issues are involved. In short, Petitioners have made no compelling argument calling for the exercise of this Court's discretion now beyond the statement that:

> "[t]he constitutional question is one which may recur in other jurisdictions, with potentially serious effect, if the California precedent is followed, on the financial stability of the more than 1,700 companies comprising the independent telephone industry of the United States." (Pet., 7.)

The Commission respectfully submits that there is little, if any, likelihood that the circumstances involved herein will recur in the future. The fact situation that gives rise to the controversy is complicated and unique. Despite the long period of time that this nation has had the benefit of telephone service, there is no indication that anything close to the present controversy has occurred in the past.

Petitioners' statement regarding mere possibilities cannot transform the instant proceeding into an important Federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for the Public Utilities Commission of the State of California

Dated: January 4, 1974

(Appendix Follows)

Appendix

Decision No. 80487

Before the Public Utilities Commission of the State of California

In the matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.	Application No. 51774 (Filed March 17, 1970)
William M. Bennett, Consumer Spokesman, and Consumers Arise Now, and association, Complainants, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant.	Case No. 9036 (Filed April 13, 1970)
144 Spanish-Speaking Telephone Subscribers from San Francisco, Sonoma, and Imperial Counties, the Spanish Speaking/Surnamed Political Association, the Mexican-American Political Association, the Healdsburg and Windsor Local Action Councils, Complainants and (Proposed) Protestants, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant and Applicant in Proposed Rate Increase #51774.	Case No. 9042 (Filed April 2, 1970)

William M. Bennett, Consumer Spokesman, and Consumers Arise Now, an association, Complainants, vs. Western Electric Company, joining Pacific Telephone and Telegraph Company and American Telephone and Telegraph Company as Interested Parties, Defendants.	Case No. 9043 (Filed April 6, 1970)
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the Pacific Telephone and Telegraph Company.	Case No. 9044 (Filed April 7, 1970)
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of all the telephone corporations listed in Appendix A, attached hereto.	Case No. 9045 (Filed April 7, 1970)
In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California in any amount necessary to offset increases in wage and salary rates.	Application No. 52794 (Filed August 6, 1971)

ORDER GRANTING REHEARING AND STAY, IN PART, OF DECISION NO. 80346 AND DENYING REHEARING AND STAY IN DECISIONS NOS. 80347 AND 80348

William M. Bennett and Consumers Arise Now, the City of Los Angeles, General Telephone Company of California,

Garret Shean and Consumers Arise Now, the City of San Diego, Continental Telephone Company, California Independent Telephone Association, and Sylvia M. Siegel have filed petitions for rehearing and stays of Decisions Nos. 80346, 80347 and 80348. The Commission has considered each and every allegation therein and is of the opinion that good cause for rehearing and a stay, in part, of Decision No. 80346, as hereafter specifically described, has been set forth.

It Is Ordered that rehearing of Decision No. 80346 is hereby granted, but limited, however, to the issue of refunds required to be made by General Telephone Company of California, Continental Telephone Company of California and all other independent telephone companies named as respondents in Case No. 9045, in ordering paragraphs 3, 4, and 5 of Decision No. 80346. In conformance with the foregoing a stay is hereby granted, until further order of this Commission, of said ordering paragraphs 3, 4, and 5. Such rehearing shall be held at such time and place and before such Commissioner and Examiner as may hereafter be designated. In all other respects rehearing and stay of Decision No. 80346 are hereby denied.

It Is Further Ordered that respondent independent telephone companies in Case No. 9045 shall continue to maintain records for possible refund purposes and to accumulate interest on such refunds at the rate of 7 percent per annum.

It Is Further Ordered that rehearing and stays of Decisions Nos. 80347 and 80348 are hereby denied.

Dated at San Francisco, California, this 12th day of September, 1972.

VERNON L. STURGEON
President

WILLIAM SYMONS, JR.

THOMAS MORAN

D. W. HOLMES

Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Decision No. 81367

Before the Public Utilities Commission of the State of California

In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.	Application No. 51774
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of The Pacific Telephone and Telegraph Company.	Case No. 9044
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, separations, practices, contracts, service and facilities of the telephone operations of certain telephone corporations.	Case No. 9045

ORDER STAYING DECISIONS

On August 8, 1972 the Commission issued Decision No. 80346 ordering, among other things, that General Telephone Company of California (General), Continental Telephone Company of California (Continental) and all other independent telephone companies made respondents in Case No. 9045 make certain refunds. Decision No. 81212, issued after rehearing, affirmed Decision No. 80346 and ordered that the determination of time for compliance with the refund orders in Decision No. 80346 was to be computed from the effective date of Decision No. 81212; i.e., March 27, 1973.

General, Continental and California Independent Telephone Association having filed with the Supreme Court a petition for writ of review and a petition for stay of Decisions Nos. 80346 and 81212, and the Commission being of the opinion that good cause exists for staying Decision No. 81212 and Ordering Paragraphs 3, 4 and 5 of Decision No. 80346;

Therefore, It Is Ordered that Decision No. 81212 and Ordering Paragraphs 3, 4 and 5 of Decision No. 80346 are hereby stayed until further order of the Commission.

Dated at San Francisco, California, this 8th day of May, 1973.

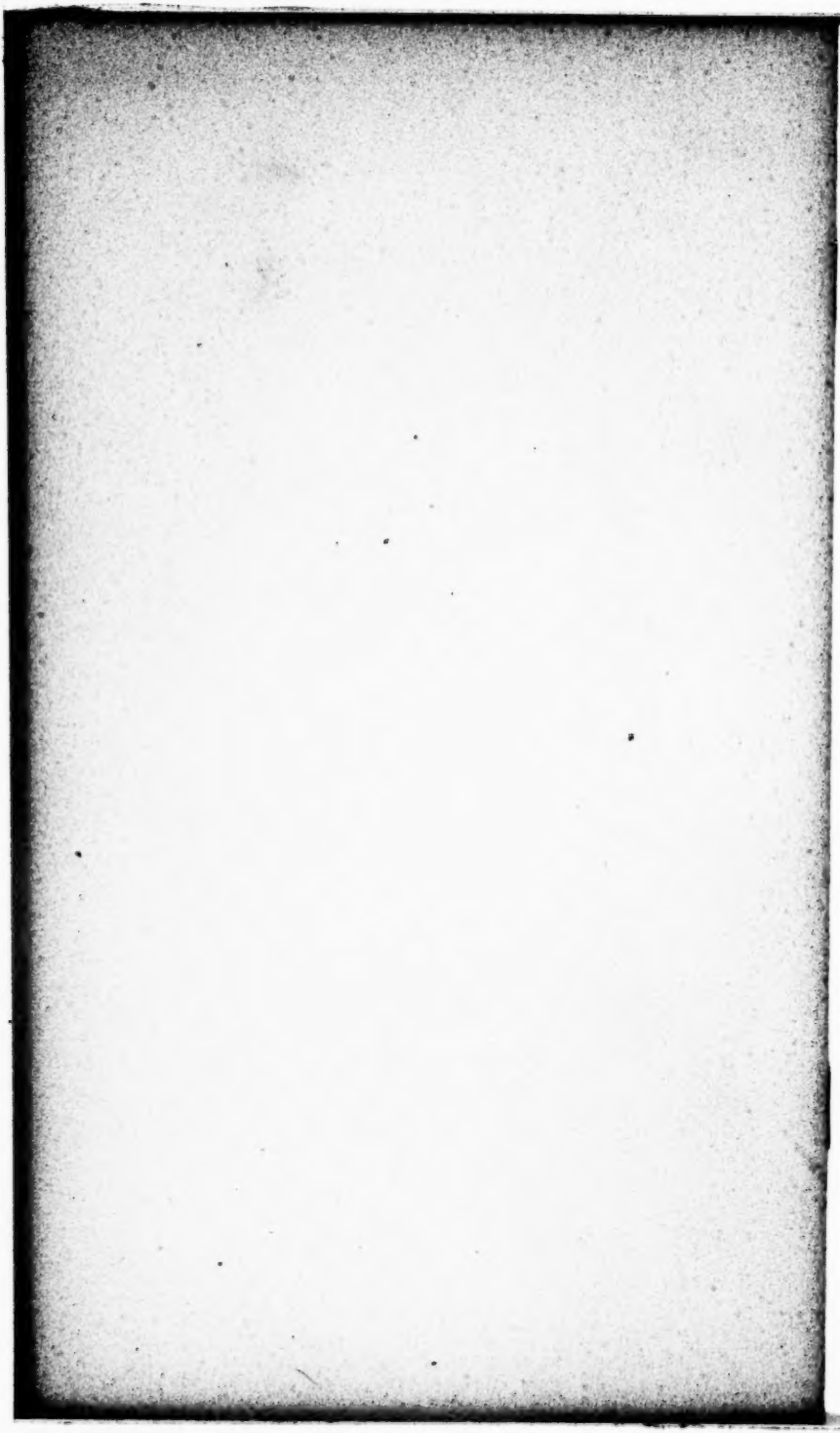
/s/ VERNON L. STURGEON
President

/s/ WILLIAM SYMONS, JR.

/s/ THOMAS MORAN

/s/ D. W. HOLMES
Commissioners

Commissioner J. P. Vukasin, Jr. being necessarily absent, did not participate. in the disposition of this proceeding.



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IN THE

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October Term, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

(Dated: January 17, 1974)

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The Brief for Respondents in Opposition mistakenly asserts that resolution of the present controversy involving the independent telephone industry of California turns on a fact situation which is unique and unlikely to recur (Brief in Opp., 2, 9-10). The practice of providing for adoption by independent telephone companies of rates fixed for Bell System companies in some categories of service is by no means unique to California but is followed in numerous other states and also by the Federal Communications Com-

mission in fixing interstate toll rates.* It thus affects hundreds of independent telephone companies large and small.**

Moreover, the constitutional question presented (Pet., 2) is not limited to situations involving adopted rates but is of more general importance. The constitutional prohibition against retroactive rate-making comes into play in any case in which a utility is required to refund revenues previously collected under unconditional commission-prescribed tariffs. Respondents' statement of the question presented (Brief in Opp., 2) omits reference to the fact that in the present case there was no stay or impoundment provision except as to Pacific, the Bell System company. Respondents' own quotation from the partial stay order issued by the Supreme Court of California (Brief in Opp., 3) shows that the stay order applied only to "sums collected by Pacific." Respondents resort to the argument (Brief in Opp., 8) that the stay order should nevertheless be construed as applying to the independent companies even though they were not named in it and were not even parties to the proceeding in which it was issued. To accept

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* *See, e.g., Telephone Toll Rates and I-I Toll Settlements,* 87 P.U.R.3d 443, 444 (Fla. Pub. Serv. Comm'n 1971); *Indiana Bell Tel. Co.,* No. 32278 (Pub. Serv. Comm'n of Ind., Apr. 9, 1970), *digested in* Vol.D P.U.R. Dig.2d § 582 (Supp. 1968-72); *General Tel. Co. of Upstate N.Y.,* 90 P.U.R.3d 30, 37 (N.Y. Pub. Serv. Comm'n 1971); *Intrastate Tel. Toll Rates,* 67 P.U.R.(n.s.) 63 (N.C. Util. Comm'n 1947); *General Tel. Co. of Ohio,* 88 P.U.R.3d 216, 220-221 (Ohio Pub. Util. Comm'n 1971); *Inter Mountain Tel. Co.,* 19 P.U.R.3d 109, 110-111 (Tenn. Pub. Serv. Comm'n 1957); *State Tel. Co. of Wis.* 1928A P.U.R. 249, 253-54 (Wis. R.R. Comm'n); 47 C.F.R. §§ 61.135-.136 (1972). *See also,* National Ass'n of Reg. Util. Comm'rs, *A Compilation of Long Distance Tel. Rates for Two-Point Serv. of the Bell System* 6 (1972).

** In California these companies range in gross annual revenues from $20,000 to $500,000,000 (Pet. App., 150a).

this argument would necessitate reading into the stay order of the California Supreme Court the imposition of a refund requirement on Petitioners without their having been afforded notice and an opportunity to be heard—a clear violation of due process.

Respondents argue that the adopted rates of the independents are not fixed in relation to their own revenues since the Commission requires them to adopt rates fixed for Pacific on the basis of Pacific's revenues. Even if true, it is difficult to perceive the relevance of this to the constitutionality of retroactive reclamation of revenues collected under final commission-prescribed rates. Regardless of the procedure by which the rates were fixed, the confiscation of revenues collected under those rates without any stay or provision for impoundment is unconstitutional.

Respondents concede that the Commission did rely upon the revenues to be derived from the adopted rates in setting local exchange rates for petitioner General Telephone Company of California (Brief in Opp., 8). Despite this they argue that the local exchange rates were not before the Commission when the adopted rates were authorized, or before the Court below when Pacific's rate increase was annulled, and are therefore not properly before this Court (Brief in Opp., 8-9). This misses the point of Petitioners' argument (Pet., 12-13). The constitutional defect does not lie in the local exchange rates themselves. It lies rather in the retroactive taking of revenues upon which the Commission by its own admission relied in setting the local exchange rates. This is an argument which was indeed raised below (Pet. App., 117a-19a).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, a writ of certiorari should issue.

Dated: January 17, 1974

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